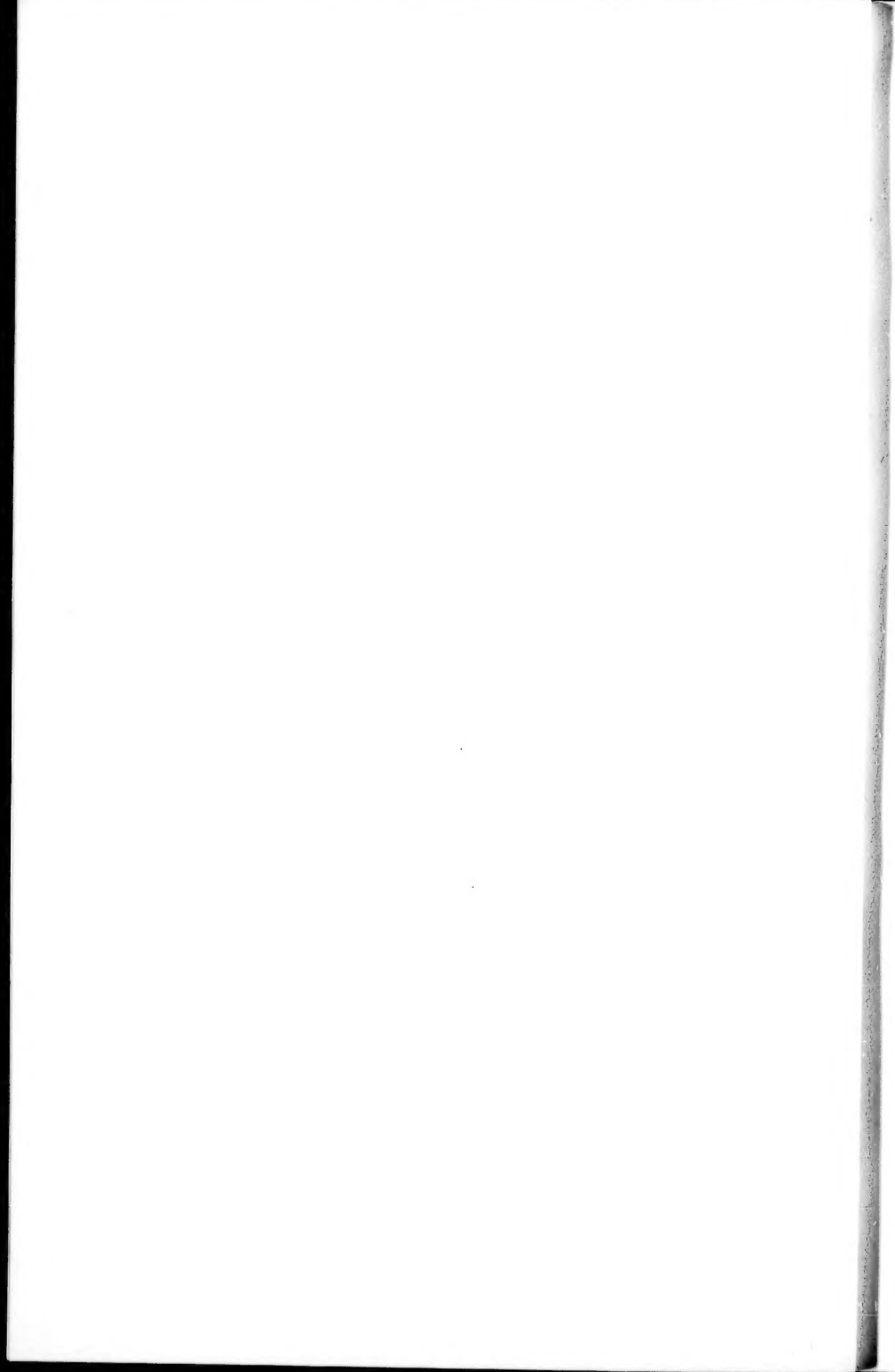




THE
DIVISION COURTS ACT
OF THE
PROVINCE OF ONTARIO.

Being R.S.O. chapter 60, and Amendments thereto.

TOGETHER WITH
THE GENERAL RULES AND FORMS
FULLY ANNOTATED,
AND ADDITIONAL FORMS OF PROCEEDINGS RELATING TO
DIVISION COURTS.

SECOND EDITION.

BY

JAMES BICKNELL

Of Osgoode Hall, Barrister-at-Law,

AND

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"The Liquor License Act of Ontario," etc.*

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PREFACE TO SECOND EDITION.

The Editors have brought the present work down to date. Nearly 2000 new cases have been cited. Recognizing the fact that the Rules and the Act form but one code of practice, and that the provisions of each were intended to fit into the other, the Editors have woven the Rules into the text so that the two constitute one fabric. To insure absolute accuracy, the Rules have also been printed in full, with references to the various pages of the work in which they are cited.

The work will now form a complete annotated code. The desire of the Editors has been to group the annotations so that all that was necessary to be known of any subject could be found at one place. Practitioners, it is hoped, will thus be able to trust Division Court work even to the most inexperienced of their staff without any apprehension that a false step will be made.

TORONTO, 5th June, 1900.

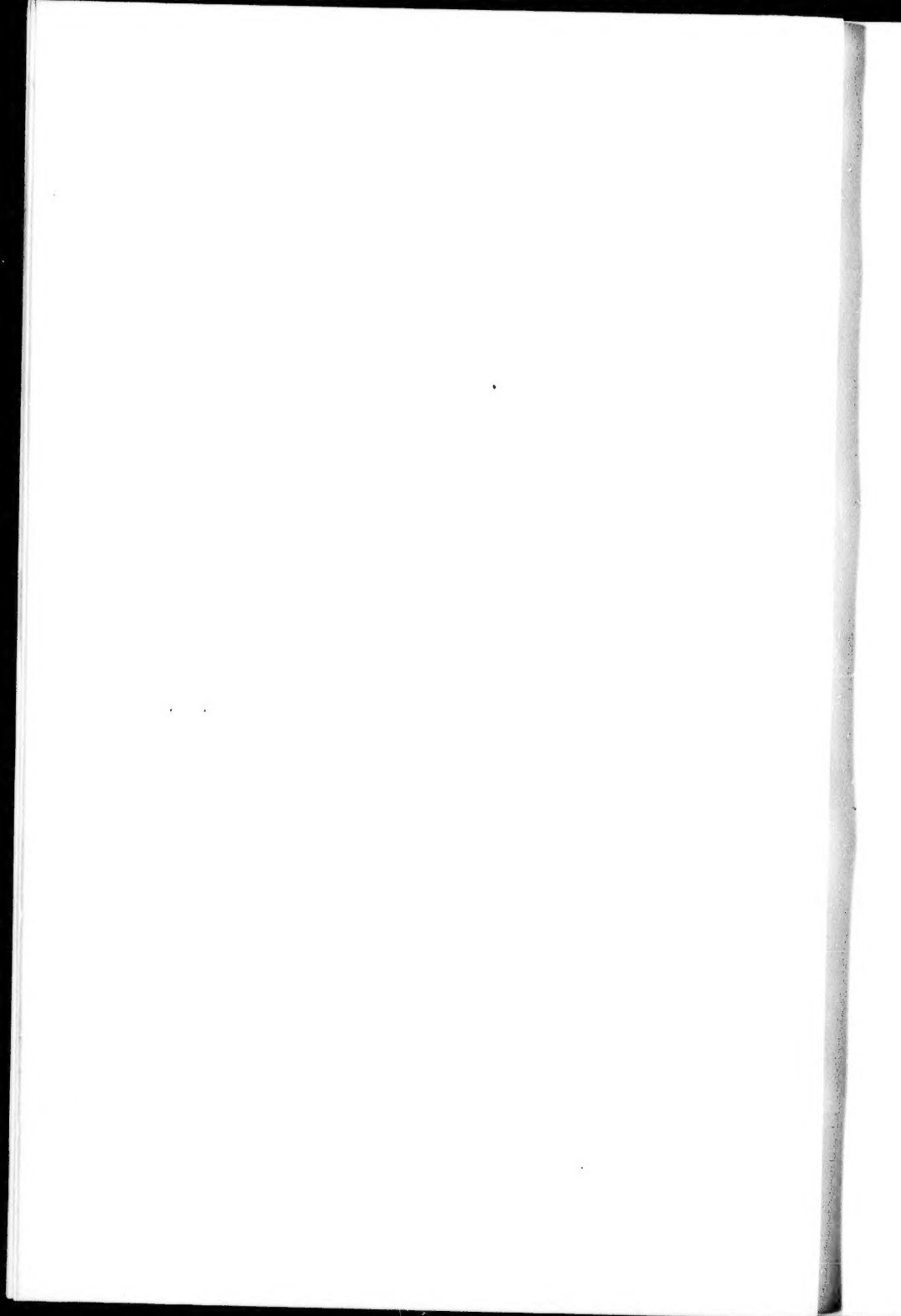


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THE DIVISION COURTS ACT

OF THE

PROVINCE OF ONTARIO

BROUGHT INTO FORCE ON THE 31ST DAY OF DECEMBER, 1897,

AND AMENDMENTS THERETO.

CHAPTER 60.

An Act respecting the Division Courts.

HER MAJESTY, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:—

1. This Act may be cited as "*The Division Courts Act*." Short title.
R.S.O. 1887, c. 51, s. 1.

The Division Courts Act.—Division Courts were established in 1840, by the statute 4 and 5 Vic., c. 23, and the Court of Requests, which theretofore had been the tribunal for collecting small debts, was abolished.

2. In the construction of this Act,

"County" shall include two or more Counties united for judicial purposes; and in any form or proceeding the words "United Counties" shall be introduced where necessary.
R.S.O. 1887, c. 51, s. 2.

Interpreta-
tion.
"County."

See Interpretation Act, R. S. O. c. 1, s. 8 (12). "County" means a portion of territory set apart for municipal, not electoral, purposes: R. v. Shavelear, 11 O.R. 727.

THE COURTS.

3. The Division Courts, and the limits and extent thereof existing at the time this Act takes effect, shall continue until altered by law. R.S.O. 1887, c. 51, s. 3.

Courts con-
tinued.

As to change of limits of Courts, see sections 15, 16 and 17 of this Act.

Number of
Courts in
each county

4. There shall not be less than three nor more than twelve Division Courts in each County, of which Division Courts there shall be at least one in each City and County Town. R.S.O. 1887, c. 51, s. 4.

In Each County.—There cannot be less than three nor more than twelve divisions in each county, or union of counties, even under section 16.

Designa-
tion of
Court.

5. The Court in each division shall be called "The First Division Court in the County of _____,"
(or as the case may be). R.S.O. 1887, c. 51, s. 5.

As the Case May Be.—Usually numbered consecutively, commencing with that in the county town as number one: 7 U.C.L.J. 147.

Each Court
to have a
seal.

6. Every Division Court shall have a seal, with which all process of the Court shall be sealed or stamped, and such seal shall be paid for out of the Consolidated Revenue Fund. R.S.O. 1887, c. 51, s. 6.

Under Seal.—Rule 9 provides that the first process issued under seal shall be the commencement of the action. The seal of a court with the words, "Sealed with the seal of the court," proves itself and will be taken judicial notice of: *Doe d. Duncan v. Edwards*, 9 A. & E. 554. The seals adopted by Division Court clerks, showing the number of the court and the county in which it is, without wax or other foreign substance, are valid within this clause: *Ontario Salt Co. v. Merchants' Salt Co.*, 18 Gr. 551.

Process.—Under rule 2 (15), "process" means any summons, writ or warrant issued under the seal of the court or a judge's summons or order. Rule 8 provides that all first process, with the exception of warrants of attachment issued by justices of the peace, shall be issued under the seal of the court, be signed by the clerk, dated on the day on which the claim is entered for suit, and numbered to correspond with the claim on which it issues. Without a seal the process would be irregular and liable to be set aside: *Smith v. Russell*, 1 Cham. R. 193, unless an amendment were allowed, but such amendment would be allowed as a matter of course, the mistake being a misprision of the clerk: *Cheese v. Seales*, 10 M. & W. 488, Rules 236 to 239.

Consolidated Revenue Fund.—Application for seals should be made to the inspector of Division Courts, by whom accounts are certified and sent to the Provincial Treasury for payment.

Not to be
Courts of
Record.

7. The Division Courts shall not be held to constitute Courts of Record, but the judgments in the said Courts shall have the same force and effect as judgments of Courts of Record. R.S.O. 1887, c. 51, s. 7.

Courts of Record.—Courts of Record are defined to be those "where the judicial acts or proceedings are enrolled for a perpetual memorial and testimony; which rolls are called records of the court, and are of such high and super-eminent authority that their truth is not to be called in question": Wharton, 620.

EFFECT OF JUDGMENT.

Res Judicata.—Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case actually decided by the court and appearing from the judgment itself to be the ground on which it was based, unless evidence was admitted in the action in which the judgment was delivered, which is excluded in the action in which that judgment is intended to be proved: *Stephen's Dig. Ev. Art. 41*. All that was essential to the decision may be taken to be conclusively determined: *Concha v. Concha*, 11 App. Cas. 541. It must be shown that the former suit was one in which the plaintiff might have recovered previously what he seeks in the second suit: *Midland Ry. v. Martin*, (1893) 2 Q.B. 172. A judgment by consent is as effective as an estoppel as a judgment given in a contested case: *Re South American and Mexican Co., Ex parte Bank of England*, (1895) 1 Ch. 37. A judgment in a Division Court is a bar to an action on the same subject matter in any other court: *Austin v. Mills*, 9 Ex. 288; *Flitters v. Allprey*, L.R. 10 C.P. 29; *Fraser v. Orbendorfer*, 36 C.L.J. 101; but the causes of action must be the same; as, if a judgment be recovered for personal injuries, it is no bar to an action for injury to property, real or personal, arising out of the same act: *Brunsdon v. Humphrey*, 14 Q.B.D. 141. A judgment of a foreign court having the force of *res judicata* in the foreign country has like force in Canada: *Law v. Hanson*, 25 S.C.R. 69.

A judgment against one of two or more debtors or joint contractors is, though unsatisfied, a bar to any action brought against others upon the joint contract or for the joint debt: *King v. Hoare*, 13 M. & W. 494; *Kendall v. Hamilton*, 4 App. Cas. 504; *Cambeport v. Chapman*, 19 Q.B.D. 229; *Hammond v. Schofield*, (1891) 1 Q.B. 453; *Kreh v. Bishop*, 17 C.L.T. 278; and this is so even though one of the contractors is a married woman liable only in respect of her separate estate: *Hoare v. Niblett*, (1891) 1 Q.B. 781; and a judgment against an agent would be a bar to an action against the principal in respect to the same debt: *Searf v. Jardine*, 7 App. Cas. 345; *Curtis v. Williamson*, L.R. 10 Q.B. 57, and in such a case the court will not allow the plaintiff to vacate his judgment: *Toronto Dental Mfg. Co. v. McLaren*, 14 P.R. 89.

But if a judgment be given for the defendant in whole or in part, the right to succeed in a new action depends upon the course of the former action. If that action should have been discontinued or dismissed for want of prosecution, it would form no bar: *Roberts v. Lucas*, 11 P.R. 3. If the plaintiff offered no evidence on the prior action on a particular part of his claim, then a new action may be brought for such part; but if he does offer evidence and fails, he is prevented from bringing a fresh action: *Stafford v. Clark*, 2 Bing. 377; *Hadley v. Green*, 2 Crompt. & J. 376; *Elliott v. Elliott*, 20 O.R. 134. If the action should have failed because prematurely brought, or for want of privity, it would form no bar to recovery in the second action: *Chisholm v. Morse*, 11 C.P. 589; *Heming v. Wilton*, 5 C. & P. 54; *Palmer v. Temple*, 9 A. & E. 508; *Re Donovan*, *Wilson v. Beatty*, 29 Gr. 280. Where judgment in the first action was given against the plaintiff on the ground that the agreement relied on was within the Statute of Frauds and void for not being signed, a subsequent action for the plaintiff's share of the proceeds realized under the agreement was held not to be barred: *Stuart v. Mott*, 23 S.C.R. 153, 384; and where in an action as to the construction of a deed plaintiff claimed the benefit of a reservation contained in a prior agreement, but judgment was given against him, on the ground that the agreement was superseded by the deed, it was held that a subsequent action to re-form the deed was not *res judicata* by the previous judgment: *Cooper v. Erie Co. Nat. Gas and Fuel Co.*, 29 S.C.R. 591; but, subject to exceptions, the general rule is that where the cause of action is the same and the plaintiff has an opportunity in the former suit of recovering that

which he seeks to recover in the second, the former recovery is a bar to the latter action: *Nelson v. Couch*, 15 C.B.N.S. 108; *Davidson v. Belleville & North Hastings Ry. Co.*, 5 A.R. 315.

A defendant against whom a judgment is recovered is estopped from denying the indebtedness found to be due by the judgment: *Boileau v. Rutlin*, 2 Ex. 665. The defendant must take every defence open to him in the action, and if he omits to do so before judgment, he cannot do so afterwards: *Howlett v. Tarte*, 10 C.B.N.S. 813; *Cochrane v. Hamilton Prov. & Lean Socy.*, 15 O.R. 128; and if money be paid under compulsion of legal process, it cannot be recovered back: *Marriott v. Hampton*, 3 Smith's L.C. 1686; 4 R.R. 439, even by showing that a sum had been paid for which no credit was given: *Sorenson v. Smart*, 5 O.R. 678. A judgment by consent, if good upon its face, is binding, although the subject matter may have been beyond the jurisdiction of the court: *Ribble Joint Com. v. Croston Urban Council*, (1897) 1 Q.B. 251.

But if the judgment has been obtained by an untrue statement of facts: *i.e.* by fraud, it is not a valid judgment: *Magurn v. Magurn*, 11 A.R. 178; *see* 6 C.L.T. 157, "Fraudulent and Collusive Judgments." And a judgment obtained in an inferior court in a matter over which it had no jurisdiction is a nullity: *Forbes v. Mich. Central Ry. Co.*, 20 O.R. 584; *Keating v. Graham*, 26 O.R. 360.

Interest.—A judgment of a Court of Record bears interest, R.S.O. c. 51, s. 116; and, therefore, a judgment of a Division Court, under this section, also bears interest. The decision in *R. v. Cy. Ct.*, Judge of Essex, 18 Q.B.D. 704, deciding that County Court judgments in England do not bear interest, is, therefore, inapplicable in this Province.

Action.—A judgment creates a specialty debt, and is enforceable by action: *Hodsdoll v. Baxter*, E.B. & E. 884; *Grant v. Easton*, 13 Q.B.D. 302; and a judgment of a higher court may be enforced by action in the Division Court: *Eberts v. Brooke*, 11 P.R. 296; *Aldrich v. Aldrich*, 23 O.R. 374, 24 O.R. 124; but not a mere order of the court: *Re Kerr v. Smith*, 24 O.R. 473. But by 61 Vic., c. 15, s. 9, "no action shall be brought in the Division Court upon any judgment decree or order for the payment of money made by the High Court or the County Court where execution may issue in or in respect to such judgment, decree or order." Actions on judgments are not to be favored as there is another remedy for enforcing them: *Biddleston v. Whitel*, 1 W. Bl. 507; and costs will not be allowed: *Philpott v. Leham*, 35 L.T.N.S. 855; unless other and distinct causes of action are added: *Jackson v. Everett*, 1 B. & S. 857.

Limitation.—An action is not maintainable upon a judgment over twenty years old without a payment or acknowledgment in the meantime: R.S.O. c. 72, ss. 1 and 8; *Chard v. Rae*, 18 O.R. 371; but the rights of the plaintiff are not barred until twenty years have elapsed: *Allan v. McTavish*, 2 A.R. 278; *Boice v. O'Loane*, 3 A.R. 167; and a revivor gives a new starting point to the statute: *McCallough v. Sykes*, 11 P.R. 337.

If execution is issued on the judgment within six years, there is no necessity of revival within twenty years: *Jenkins v. Kerby*, 2 L.J.N.S. 164; but if no execution be issued within such period, an application to the judge is necessary for leave, unless a payment has been made within twelve months before issue of execution: *see* Rule 141. Such leave will not be given unless the application be made within twenty years: *McMahon v. Spencer*, 13 A.R. 430; even though an execution may in the meantime have been issued thereon: *Price v. Wade*, 14 P.R. 351.

Upon a foreign judgment an action must be brought within six years: *North v. Fisher*, 6 O.R. 206.

It was held, in *Berkeley v. Elderkin*, 1 E. & B. 805, and *Austin v. Mills*, 9 Ex. 288, that no action was maintainable in a Superior Court on an English County Court judgment. The authority of these cases was recognized by the English Court of Appeal in *Bailey v. Bailey*, 13 Q.B.D. 855; *R. v. Cy. Ct. Judge of Essex*, 18 Q.B.D. 706. They were followed in *McPherson v. Forrester*, 11 U.C.R. 362, and *Donnelly v. Stewart*, 25 U.C.R. 398, where our Court of Queen's Bench held that no action would lie in any Superior or County Court on a Division Court judgment. The last case was decided in 1866. At that time the section simply enacted that Division Courts should not be held to constitute Courts of Record: C.S.U.C. c. 19, s. 5. The concluding words of the section were introduced in 1869, but notwithstanding them in *Aldrich v. Aldrich*, 23 O.R. 376, 24 O.R. 124, it seems to be assumed that a judgment of a Division Court is not a final judgment. See section 153.

It seems clear that a Division Court is not a Court of Record, notwithstanding *Corsant qui tam v. Taylor*, 10 L.J.N.S. 320; see *Farr v. Robins*, 12 C.P. 35. A judgment may be recalled and a term imposed or a change made at any time before a judgment found is entered: *Canada Land & Emigration Co. v. Dysart*, 9 O.R. 495, 512; but after the judge has entered a judgment, he cannot alter same, except by consent or on an application for or after a new trial: *Irving v. Askew*, L.R. 5 Q.B. 208; even though it may have been obtained by misrepresentation or fraud: *Preston Banking Co. v. Allsup*, (1895) 1 Ch. 141; unless the formal judgment does not really express his meaning: *The Receipts*, (1893) P. 255; *Re Sevrin*, 30 Ch. D. 239; *Ainsworth v. Wilding*, (1896) 1 Ch. 673; *Tucker v. New Brunswick Trading Co.*, 44 Ch. D. 249. But the court, in the exercise of its inherent powers over its records, can correct an error arising from an accidental slip or omission in its order: *Cousins v. Cronk*, 17 P.R. 348.

Reviving Judgments.—During the lives of the parties or of any of them execution may issue at any time within six years: Rule 139. If a judgment is more than six years old execution cannot be issued upon it without leave of a judge, unless some payment has been made thereon within twelve months previously. Such leave will be granted without notice to the debtor and must be expressed on the execution, warrant or summons in the words, "Issued by leave of the judge": Rule 141. Leave would not be given unless the application should be made within twenty years from the entry of judgment: *McMahon v. Spence*, 13 A.R. 430; even though an execution may in the meantime have been issued thereon: *Price v. Wade*, 14 P.R. 351.

8. A Court shall be holden in each division once in every two months, or oftener in the discretion of the Senior or the acting County Judge; and the Judge may appoint and from time to time alter the times and places within such divisions, when and at which such Courts shall be holden. R.S.O. 1887, c. 51, s. 8.

Time and
place of
holding
Courts.

Each Division.—Except in cities where there are two divisions, the clerk's office must be within the division: Rule 145, and by section 9 the Governor-in-Council may designate the place where such office may be situated. The sittings of the court must also be within the division, and the judge has no power to sit outside of it: *Serjeant v. Dale*, 2 Q.B.D. 558; *Hudson v. Took*, 3 Q.B.D. 46, except as provided in section 11 (2).

Every Two Months.—A substantial compliance with this provision would be the holding of a sitting in each division six times during the year, as nearly as possible at regular intervals. See sec. 13 post. See Rules 253 and 254, and notes to section 150.

"Discretion" means, "according to the rules of reason and justice, not private opinion": *Lee v. Bude Ry. Co.*, L.R. 6 C.P. 576; *Rook's Case*, 5 Rep. 100 (a) "not capriciously but on judicial grounds and for substantial reasons": per *Jessel M.R.*, re *Taylor*, 4 Ch. D. 160. See notes to sec. 181 post, "In the opinion of the Judge."

Questions of jurisdiction frequently arise which have to be determined by the place of sitting, and the place of holding the court should be changed as seldom as possible. No general rule can be proposed as to the place where the sittings of a court should be held; the question, as it arises in each case, must be settled with reference to the particular circumstances involved": 7 U.C.L.J. 312.

Holding
Courts in
cities, and
offices of
clerk
therein.

Appoint-
ment of
place of
office of
Division
Court Clerk

9. Notwithstanding anything contained in this Act, or any of the general rules now or hereafter in force in the Division Courts of this Province, in any City in which two Division Courts are established or held, all or any of the sittings of both of such Courts may be appointed and held in either of such divisions, and the Clerks of both Courts may, with the approval of the Lieutenant-Governor in Council, have and keep their offices in the same division in such City, and the Lieutenant-Governor in Council may designate and appoint the place within any division in the Province where the office of the Clerk of such division shall be situated. R.S.O. 1887. c. 51, s. 9; 57 V., c. 23, s. 9.

The Same Division.—The Court House in a city is the most convenient place for the sittings of the courts, hence this provision for holding both courts in the same division, but it is not compulsory. The clerks in cities may also, with the approval of the Lieutenant-Governor-in-Council, have their offices in the same division.

Sittings in
Toronto.

10.—(1) In each of the Courts of the two divisions of the City of Toronto known as the First and the Tenth Division Courts of the County of York, at least weekly sittings shall be held, except during the month of August, for the trial of causes; and in each of the said two Division Courts at least monthly sittings for the hearing of judgment summonses; and also sittings at least every two months for the trial of cases where juries have been demanded.

(2) The Judges of the County Court of the County of York, or any two of them, of whom the Senior Judge shall be one, may appoint additional sittings for any of the above purposes, and the Lieutenant-Governor in Council also shall have authority to appoint other sittings for any of the said purposes. 54 V., c. 15, s. 3.

Division
Courts
accommo-
dation.

11.—(1) The municipality in which a Division Court is held shall furnish a Court room and other necessary accommodation for holding said Court, not in connection with an hotel.

(2) In case a proper Court room and other necessary accommodation for the holding of the Division Court are not furnished by the municipality in which the Court is held, the Judge may hold the Court in any suitable place in the division, or in any other division of the County in which suitable accommodation is provided; and the owner, lessee or tenant of the building in which the Court is so held, shall for the use of the building be entitled to receive from the municipality whose duty it was to provide proper accommodation for the Court, the sum of \$5 for every day on which the Court is held in the building.

If there be no proper Court room, etc., the Judge may hold Court in any suitable place.

Expenses for rent.

(3) Where a municipality, not being a Town or City, furnishes a Court room and other necessary accommodation for a Division Court as aforesaid, or pays any owner, lessee or tenant for the use of any building, it shall be entitled to recover from any other municipality wholly or partly within the division for which such Court is held, such reasonable share of the cost of providing accommodation for holding the Court as shall in that behalf be decided and ordered by the Judge of the said Court, to be paid and contributed by the latter municipality, and in every such case the total cost of providing such accommodation for holding the Court shall be deemed to be \$5 for every day on which the Court is held. R.S.O. 1887, c. 51, s. 10.

Judge to apportion costs in certain cases

Necessary Accommodation.—What is "necessary accommodation" cannot be particularly defined, for in a city better accommodation would be expected than in a thinly-settled part of the country; but it might be said that proper and becoming provision for the comfort and convenience of those attending court, which, under the particular circumstances of a municipality, its council would be expected to provide for that purpose. It includes heating and lighting, and suitable accommodation for seating the officers of the court, professional gentlemen, litigants and others attending court.

An Hotel.—The propriety of this provision is evident. Probably a judge would feel warranted in holding that not only does the section prohibit the holding of courts at licensed houses, but at all taverns, inns, or houses of public entertainment.

In Which the Court is Held.—Where one division comprises more than one municipality there was originally no provision for making any other than that in "which the court is held" contribute a share of the expenses. But this omission has been supplied by sub-section 3, which now makes provision for such a case.

Accommodation is Provided.—This is an exception to the rule requiring courts to be held within their division, according to section 8. Sub-section 3 provides for payment by each municipality, wholly or partly within the division for which the court is held, of its share of the cost of providing accommodation for holding the court, but it does not apply when the court is held *without* the division. Without this provision, the only course to compel a delinquent municipality to fulfil its duty in this

respect would be by *mandamus*: *Dark v. Municipal Council of Huron and Bruce*, 7 C.P. 378. Where a statute compelled a municipality to afford suitable accommodation to a County Attorney and Clerk of the Peace, it was held that an action was maintainable for the expenses he incurred in consequence of the default of the Municipal Council: *Lees v. The Corporation of the County of Carleton*, 33 U.C.R. 409; and see *Newsome v. County of Oxford*, 28 O.R. 442.

\$5 For Every Day.—The right being statutory no more than this sum could, under any circumstances, be recoverable: 33 U.C.R. p. 419.

Day on Which the Court is Held.—See notes to sub-section 2, *supra*.

Sub-Section 3.—Provision is here made by which each municipality forming part of a division may be compelled to bear a fair and proper share of the expense of furnishing the requisite accommodation for holding the sittings of the court in the division. The section does not apply to city or town municipalities. Before the municipality seeking contribution under the statute for money disbursed by it, from the other or others, the expenses should be first paid. Anything short of that would not give the right of action. The payment, too, must be made to the owner, lessee, or tenant of the building in which the court is held.

What a "reasonable share" of the cost of providing the accommodation is, must depend on circumstances. The judge of the court is to determine this, and to make his order accordingly. It could not be done *ex parte*. The municipality which is called upon to contribute would have the right to be heard, and to show cause why it should not pay the claim preferred: see notes to section 188. Reference may also be made to *Willis v. Gripps*, 5 Moo. P.C. 379; *R. v. Cheshire Lines Committee*, L.R. 8 Q.B. 344; *Wood v. Woad*, L.R. 9 Ex. 110; *R. v. Collins*, 2 Q.B.D. 9, 36; *Fisher v. Keane*, 11 Ch. D. 353; *Ex p. Tucker, In re Tucker*, 12 Ch. D. 308; *R. v. College of Physicians and Surgeons*, 44 U.C.R. 146; *Tunbridge Wells Local Board v. Akroyd*, 5 Ex. D. pp. 201, 204, 211; *Briggs v. Briggs*, 5 P.D. 163; *R. v. Law*, 27 U.C.R. 260.

The outside limit which *all* of the municipalities would be called upon to pay as the total cost is \$5 per day, but part of a day would count as one, no provision being made for a fractional part of a day. The sum which each would have to pay would be small, yet the proportion should, if possible, be settled upon some principle of fair contribution. It is submitted that the population and assessed value of the whole or parts of the respective municipalities within the division would be a fair basis on which to estimate the reasonable share of each.

No particular mode of collecting the amount due by the delinquent municipality is prescribed, and in the absence of such, it would seem that the proper proceedings would be an action in the Division Court: *Lees v. Corp. of Carleton*, 33 U.C.R. 409, and authorities there cited: *Richardson v. Willis*, L.R. 8 Ex. 69, or by proceedings under R.S.O. c. 76. The order of the judge is not the order of the court; he is merely *persona designata*: *Re Pacquette*, 11 P.R. 463; *Re Young*, 14 P.R. 303; *Re Rush*, 10 C.L.T. 184; *Re King*, 18 P.R. 365.

Use of
Court
House.

12. The sittings of the Division Court in a County Town may be held in the County Court House, and, in the cases of Cities and Towns separated from the County, the use of the Court House for such purpose may be taken into account in settling the proportion of the charges to be paid by the City or town for the maintenance of the Court House. R.S.O. 1887, c. 51, s. 11.

County Court House.—The right to hold sittings in the Court House could not be held to interfere with the sittings of courts of higher jurisdiction.

Maintenance of Court House.—As to the manner of settling such differences see Harrison's Municipal Manual p. 342, *et seq.*

13. If the Justices of the Peace for a county, in General Sessions assembled, certify to the Lieutenant-Governor that in any division of the county, from the amount of business, remoteness, or inaccessibility, it is expedient that the Court should not be held so often as once in every two months, the Lieutenant-Governor in Council may order the Court to be held at such periods as to him seems meet, and may revoke the Order at pleasure, but a Court shall be held in the division at least once in every six months. R.S.O. 1887, c. 51, s. 12.

The Lieutenant-Governor may, in certain cases, regulate holding of Courts.

General Sessions.—That is the sittings commencing on the second Tuesday in June and December in each year: R.S.O. c. 56, s. 4. It must be done during the Sessions: *Re Coleman*, 23 U.C.R. 615. Three things must be established to the satisfaction of the Lieutenant-Governor-in-Council, namely: (1) The amount of business; (2) remoteness; (3) inaccessibility of the court: see notes to sec. 144 post. The circumstances justifying the intervention of the justices are commented upon in 7 U.C.L.J. at pp. 177, 178.

14. The Clerk of the Peace, in a book to be kept by him, shall record the divisions declared and appointed, and the times and places of holding the Courts, and the alterations from time to time made therein, and he shall forthwith from time to time transmit to the Inspector of Division Courts a copy of the record. R.S.O. 1887, c. 51, s. 20; 55 V. c. 11, s. 3.

Clerks of the Peace to record time and place for holding Courts.

The Clerk of the Peace.—See R.S.O. c. 56, s. 11. No provision is made as to the manner in which the information here mentioned is to be imparted to the Clerk of the Peace, but it may be presumed that the judge will keep him informed. It does not seem to be incumbent upon him to attend at the meetings of the tribunal charged with the duty of appointing the number, limits and extent of the several divisions. The duty of appointing "the times and places of holding the courts" devolves upon the judge under section 8. The proper course to be adopted is not at all clear.

"The entries in this book are of such a public nature, that an examined copy, or extracts therefrom, certified as such, and signed by the Clerk of the Peace, would be admissible in any Court of Justice, or before any person having by law, or consent of parties, authority to hear, receive or examine evidence:" 7 U.C.L.J. 177.

Forthwith Transmit.—See notes to section 24 as to meaning of "forthwith." The Clerk of the Peace is not bound to notify the inspector of anything but the acts of the General Sessions, as to the limits of the different divisions, and the orders of the judge as to the times and places of holding courts; nothing can be allowed the Clerk of the Peace for it: Poussett and the Quarter Sessions of Lambton, 22 U.C.R. 412.

Alteration
of number
and limits
of divisions

15.—(1) The County Judge, the Sheriff, the Warden of the County, and the Division Court Inspector, may, subject to the restrictions in this Act contained, appoint, and from time to time alter, the number, limits and extent of every division, and shall number the divisions, beginning at number one, but no resolution or order made under the provisions of this section shall be altered or rescinded, unless public notice of the intention so to alter or rescind, or that application will be made to alter or rescind is made and proclaimed in open Court at the next previous sittings of the General Sessions of the Peace.

(2) The Judge shall cause the sheriff, warden and inspector to be notified of any application, and of the time and place at which the same will be considered. R.S.O. 1887, c. 51, s. 13. [Provided that where the Judge fails to notify the Sheriff, Warden and Inspector as aforesaid within one month after the sittings of the General Sessions of the Peace, the Inspector may fix the time and place for considering the application, and notify the Judge, Sheriff and Warden accordingly.] 61 V c. 15, s. 6.

As to courts in Provincial Judicial Districts, see R.S.O. c. 109: 61 Vic., c. 15, s. 7, and Appendix hereto.

Notice of Intention to Change Limits.—No action should be taken to alter the number, limits and extent of a division without the notice being given as required by this section. The absence of such notice would invalidate the whole proceeding: *Re Birdsall v. The Corp. of Asphodel*, 45 U.C.R. 149; *R. v. Court of Revision of Cornwall*, 25 U.C.R. 286; *Re McGregor v. Norton*, 13 P.R. 223. The giving and proclamation of the notice are conditions precedent to the making of any resolution or order affecting the limits and extent of any division: *Re Meyers and Wonnacott*, 23 U.C.R. 611; *Griffiths v. Municipality of Grantham*, 6 C.P. 274; *Shaw v. The Corp. of Manvers*, 19 U.C.R. 288; *Askew v. Manning*, 38 U.C.R. 349.

The notice should set out particularly the changes proposed, and the "limits and extent" of each division to be affected by it: *Hancke v. Municipality of Markham*, 17 U.C.R. 562; *Re Simmons v. Corporation of Chatham*, 21 U.C.R. 75; *The Chief Superintendent, In re Shorey v. Thrasher*, 30 U.C.R. 504.

The notice and its proclamation should be carefully entered by the Clerk of the Peace in a book to be kept by him as a record of what was done and as evidence of a compliance with the statute. The order making the change need not recite the statute: *Re Ness and The Municipality of Saltfleet*, 13 U.C.R. 408, but it would be better to do so; and the order should follow the notice in defining the "limits and extent" of the divisions affected by it.

The decision of a majority of the members of the tribunal would be good: R.S.O. c. 1, s. 8, (34); *Re Ontario and Quebec*, 6 L.J.N.S. 212. But in order to justify a decision by less than the whole number there should first be an opportunity for a full discussion and a final refusal to agree: *Goodman v. Sayers*, 2 J. & W. 249; *Dalling v. Matchett, Willes*,

215; *Re Morphett*, 2 D. & L. 967; *Young v. Bulman*, 13 C.B. 623; *White v. Sharp*, 12 M. & W. 712; *Thomas v. Harrop*, 1 S. & S. 524; *Re Pering v. Keymer*, 3 A. & E. 245; *Re Templeman and Reed*, 9 Dowl. 962; *Hawley v. North Staffordshire Ry. Co.*, 2 De G. & S. 33; *Willoughby v. Willoughby*, 9 Q.B. 923. Neither one could delegate his authority: *Harrington v. Edison*, 11 U.C.R. 114; *Haskins v. St. Louis and S. E. Ry. Co.* 109, U.S. Sup. Ct. 923.

If any member of this tribunal should omit to take the oath of office or some necessary act or thing before entering upon his official duties, or should the warden be subsequently declared unduly elected, or become otherwise disqualified, yet the action of the tribunal, being of a judicial nature, would not be illegal: *The Margate Pier Co. v. Hannam*, 3 B. & Ald. 266. The law raises a presumption in favor of the regular appointment or election of an officer from his having acted in an official capacity, and would do so in this case: *R. v. Verelst*, 3 Camp. 432; *Berryman v. Wise*, 4 T.R. 366; *Doe d. Davy v. Haddon*, 3 Doug. 310; *Marshall v. Lamb*, 5 Q.B. 115; *Wolton v. Gavin*, 16 Q.B. 48; *Butler v. Ford*, 1 Cramp. & M. 662; *R. v. Howard*, 1 M. & Rob. 187, and other cases cited in *Taylor on Evidence*, 8th ed., p. 187; *Holt v. Jarvis*, Dnn. 190; *Smith v. Redford*, 12 Gr. 316; *School Trustees, Tp. of Hamilton v. Neil*, 28 Gr. 408; *R. v. Fee*, 3 O.R. 107.

16.—(1) The Judge of a County Court may, in his discretion, upon the petition of any Municipal Council of any Township or United Townships, in which no Division Court has already been established, praying that a Division Court may be established in and for such Township or United Townships, establish and hold a Division Court therein, and the Court so established shall be numbered and called the Division Court of the County in which such Township or United Townships is or are situated, taking the number next after the highest number of the Courts then existing in such County.

Establishment by the County Judge of a Division Court in townships on petition of Township Council.

(2) No business shall be transacted in such Court until after the establishment thereof has been certified by the County Judge to the Lieutenant-Governor in Council, together with the petition praying for the same, nor until after an Order has been passed by the Lieutenant-Governor in Council approving thereof. R.S.O. 1887, c. 51, s. 14.

Court must be recommended by Lieutenant-Governor in Council.

The Judge May in His Discretion.—It is not compulsory upon the judge, but no doubt he would establish a court under this section, if required in the public interests.

Petition of the Municipal Council.—This being a corporate act, it should be adopted at a regular meeting, or at a special meeting called for the purpose, of which due notice should be given: *R. v. Hill*, 4 B. & C. 411, per Bayley, J., and should be properly attested by the corporate seal: *Grant on Corporations*, 55.

Sub-Section 2.—The court is incomplete until its executive officers are appointed. See section 28; and no business can be transacted until then.

On separation of junior from senior county. Courts to continue same till altered by Sessions.

17. Where a Junior County separates from a Senior County or Union of Counties, unless the Lieutenant-Governor otherwise by proclamation directs, the Division Courts of the United Counties which were before the separation wholly within the territorial limits of the Junior County, shall continue to be Division Courts of the Junior County, and all proceedings and judgments shall be had therein, and shall continue proceedings and judgments of the said Division Courts respectively, and all such Division Courts shall be known as Division Courts of such Junior County by the same numbers respectively as they were before, until the Judge of the County, the Sheriff, the Warden of the County and the Inspector of Division Courts appoint the number, limits and extent of the divisions for Division Courts within the limits of such Junior County, as provided in section 15 of this Act. R.S.O. 1887, c. 51, s. 15. 55 V. c. 42, s. 49 (5) part. [*See also Cap. 223, Sec. 52 (5).*]

A Senior County.—The county in which the court house and gaol are situated: Municipal Act, s. 41.

Proceedings.—Taxation of costs would be a "proceeding" under this section: *R. v. London C. & D. Ry. Co.* L.R. 3 Q.B. 170. So would a writ of revivor and suggestion: *Caspar v. Keachie*, 41 U.C.R. 601. This case was overruled but not on this point: see also *Holme v. Guy*, 5 Ch. D. 901; *Stroud*, 616.

Judgments.—The decision of the judge if not pronounced in court only becomes a judgment when duly entered in the procedure book by the clerk: *Strutton v. Johnson*, 7 L.C.G. 141; *Holtby v. Hodgson*, 24 Q.B.D. 103; see section 150. The proceedings of the court can only be proved by such entries: *R. v. Rowland* 1 F. & F. 72, per Bramwell, B.; or a certified copy under section 45, and cannot be contradicted even by the evidence of the judge: *Dews v. Riley*, 11 C.B. per Jervis, C.J., at p. 443. An entry "struck out for want of jurisdiction, a disputed title having been sworn to," is not a judgment: *Tubby v. Stanhope*, 5 C.B. 790. If pronounced in court the decision becomes a judgment *instantly*: section 150; *Holtby v. Hodgson*, 24 Q.B.D. 103.

On alteration of divisions, Judge to direct in what Court proceedings to be continued.

18. Where the Judge of the County, the Sheriff, the Warden of the County and the Inspector of Division Courts alter the number, limits or extent of the Division Courts within such county, all proceedings and judgments had in any Division Court before the day when such alteration takes effect shall be continued in such Division Court of the County as the Judge directs, and shall be considered proceedings and judgments of such Court. R.S.O. 1887, c. 51, s. 16.

See notes to section 17 and R.S.O. c. 223, s. 44.

19. In case a Junior County is separated from a Union of Counties, or the proceedings of any of the Division Courts of a Senior County are transferred to another Division Court within the County upon the order of the Judge, the Clerks or other officers of such Division Courts who hold any writs or documents appertaining to such Courts or the business thereof, shall deliver up the same to such persons as the Judge directs, and any person refusing to deliver up the same shall be liable to be proceeded against in the same manner as persons wrongfully holding papers and documents under the provisions of section 52 of this Act. R.S.O. 1887, c. 51, s. 17.

Clerks and officers to deliver papers to such persons as Judge directs.

Shall be Liable to be Proceeded Against.—See notes to section 52.

20. If after the separation of a Junior County from a Union of Counties, the territorial limits of any of the Division Courts of the former union are partly within the Junior and partly within the Senior County, all proceedings commenced in such Division Courts of the former union shall be continued to completion in the Court where the proceedings were originally commenced, or in such other Division Court of the Senior County as the Judge thereof directs; and the clerks and other officers of the said Division Courts of such Senior County in possession of any writs or documents appertaining to any such Court or to the business thereof, shall deliver over the same to the Clerk of such Division Court of such County as the Judge thereof directs. R.S.O. 1887, c. 51, s. 18.

After separation of junior from senior county, proceedings in certain cases to be continued in senior county.

After the Separation.—See Mun. Act, R.S.O. c. 223 s. 52.

Originally Commenced.—That is the court from which the first process issued: Rule 9.

21. Unless the Lieutenant-Governor by proclamation fixes the number, limits and extent of the Division Courts for the Junior County, the Judge of the County, the Sheriff, the Warden of the County and the Inspector of Division Courts, at a meeting to be called for the purpose, or at any adjourned meeting, shall, within three months after the issuing of a proclamation for separating a Junior from a Senior County, appoint the number (not less than three, nor more than twelve), the limits and extent of the several divisions within such County, and the time when such change of divisions shall take place, and no resolution or order made under the provisions of this section shall be altered or rescinded, unless public notice of the intention so to alter or rescind is made

Regulation of limits on separation of a county.

and proclaimed in open Court at the next previous sittings of the General Sessions of the Peace. R.S.O. 1887, c. 51, s. 19.

The Lieutenant-Governor.—See The Municipal Act, R.S.O. c. 223, 52(5).

At a Meeting to be Called.—It would seem that the first meeting may be held at which the number and extent of the divisions may be originally fixed without the proclamation being made at the General Sessions; but no subsequent alterations can be made unless public notice of the intention so to do is previously "made and proclaimed in open court."

No provision is made here for calling the meeting, as in sub-section 2 of section 15. No doubt the judge would do so; but no procedure is prescribed in case of his failure to call the meeting.

A full opportunity should be afforded each member of the tribunal to attend and discuss the question, otherwise the proceedings would be irregular, and any order or resolution made by those present would be bad: *Re Potter v. Knapp*, 5 P.R. 197; *Cannon v. Toronto Corn Exchange*, 5 A.R. 268; *Labouchere v. Wharmcliffe*, 13 Ch.D. 346; *Fisher v. Keane*, 11 Ch.D. 353; *Temple v. Toronto Stock Exchange*, 8 O.R. 705; notes to section 15.

Shall within Three Months.—The language of this section, it will be noticed, is express and positive. The direction is imperative: R.S.O. c. 1, s. 8, (2). But whenever the thing required by a statute to be done has reference to "the time or formality of completing any public act, not being a step in a litigation or accusation," as in this case, the enactment will generally be regarded as merely directory, unless there be words making the thing done void if not done in accordance with the prescribed requirements: *Stroud*, 723; *Cooke v. New River Co.*, 38 Ch.D. 56; *St. C.* 14 App. Cas. 698.

The tribunal here constituted may not be concluded from acting, if it neglects to do so at the proper time, but it is obvious that the neglect to perform the duty enjoined by the statute would be unjustifiable.

The notice required by the statute should be in writing, filed by the Clerk of the Peace, and entered at length in the record of proceedings at the General Sessions, together with the fact of proclamation having been made, when so made, and by whom presented.

No particular time is prescribed for the making of the proclamation at the Court of General Sessions as in some other statutes (R.S.O. c. 31, s. 18), and it may be made at any time during the sittings: *R. v. Pawlett*, L.R. 8 Q.B. 491.

Proclamation must be made "at the next previous sittings of the General Sessions of the Peace." Should the persons mentioned in this section fail to act in pursuance of the proclamation before the sittings of the General Sessions next after the making of such proclamation, they could not do so afterwards without notice being given afresh.

A majority of the members present could make a valid decision, if all had due notice of the meeting and full opportunity of discussion: see cases cited in notes to section 15; *Re Ontario and Quebec*, 6 L.J.N.S. 212; *Worts v. Worts*, 22 L.J.N.S. 282.

If the said officers exercised their judgment honestly and fairly, and consistently with legal principles, the resolution or order, if good on its face, could not be reviewed: *Baggalay v. Borthwick*, 10 C.B.N.S. 61.

It would not be so if made corruptly, or in disregard of the plain principles of law or justice: *Morgan v. Mather*, 2 Ves. Jr. 15; or if any one of them were personally interested in the subject matter: *Earle v. Stoker*, 2 Vern. 251, for he could not be judge in his own cause: *R. v. Bishop of St. Albans*, 9 Q.B.D. 454.

Should any member of the tribunal, the warden, for instance, if a Division Court clerk, be interested in extending the limits of his own division, he would be incapable of acting: see notes to section 22 for authorities as to the question of disqualifying interest.

The resolution or order should not be made separately, but while all are together: *Wade v. Dowling*, 4 E. & B., 44, and if one were excluded from the meeting by force or fraud the action of the rest would be illegal: *Re Templeman & Reed*, 9 Dowl. 962.

THE JUDGE.

22.—(1) The Division Courts shall be presided over by the County Court Judges or Junior or Deputy Judges in their respective counties. County Court Judges to preside.

(2) The Junior Judge for the county shall (subject to any other arrangements from time to time made with the Senior Judge or made by the Judges of a County Court District which includes such County) preside over the Division Courts of the county. Junior Judge to hold Division Courts

(3) The appointment of a Junior Judge shall not prevent or excuse the Judge of the County Court from presiding at any of the Division Courts within his County when the public interests require it. R.S.O. 1887, c. 51, s. 21. Senior Judge to hold Division Courts when expedient.

County Court Judges.—As to the appointment of senior or junior judge, see R.S.O. c. 54. As to qualification of county judges see 62 Vic. c. 11, s. 6. The deputy judge holds his office during pleasure, and in case of the death, illness or absence of the county judge he has authority to perform all the duties of such judge: R.S.O. c. 54, s. 10. He may practice his profession. Unlike the senior or junior judge he is not a J.P., "for every county and part of Ontario;" and his authority extends only to the county for which he is appointed; section 13. He cannot give judgment after the expiration of the period for which he is appointed: *Hoey v. McFarlane*, 4 C.B.N.S. 718.

Where a deputy judge is appointed by Government, the law presumes that the necessary facts exist to warrant such appointment, and on the party disputing the validity of the appointment rests the *onus* of establishing its invalidity: *McKenzie v. Daney* 12 A.R. 317; *R. v. Fee*, 3 O.R. 107. It was also held in the latter case that it was not essential that the county judge should be absent from the county in order to enable the deputy judge to act: see *R. v. Roberts*, 38 L.T. 690. The authority of the deputy judge, when appointed by the Government, does not terminate with the termination of the judge's authority through death, removal or resignation. In *Hoey v. McFarlane*, 4 C.B.N.S. 718, it was held that the deputy's functions ceased on the death of the judge, and that neither he nor the new judge had power to deliver judgment after the death, and that the proper course was for the new judge to rehear the case. But by section 10 of The Local Courts Act the deputy judge, when duly appointed, is expressly authorized to act "in case of the death, illness or absence of the judge." But *quære* whether the deputy judge does not, on the appointment of a new judge becomes *functus officio*.

Liability of Judge.—A county judge is not answerable in an action of trespass for an erroneous judgment or for the wrongful act of his officer, done, not in pursuance of, though under color of, a judgment; but he is

responsible for an act done by his command and authority, when he has no jurisdiction: *Houlden v. Smith*, 14 Q.B. 841. If an order of commitment were made under the judgment summons clauses to any but the goal of the county in which the party summoned resided or carried on his business, trespass would lie against the judge if a warrant issued by his authority. So, also, it would be a want of jurisdiction to summon a person under such circumstances: *Ib* 853. See also *Re Dulmage v. Judge of Leeds and Grenville*, 12 U.C.R. 32. He is also entitled to notice of action if he acted honestly, believing that his duty as a judge called upon him to do so: *Booth v. Clive*, 10 C.B. 827. Want of jurisdiction must be made to appear to the judge, and if there is no evidence of that either on the face of the proceedings (*Houlden v. Smith*, 14 Q.B. 851, *per Patteson, J.*), or given before the judge, he is not liable in trespass (*Graham v. Smart* 18 U.C.R. 482); nor are the officers of the court acting in execution of the order, *Ib.*: *Andrews v. Marris*, 1 Q.B. 3; *Watson v. Bodell*, 14 M. & W. 57; *Thomas v. Hudson*, 14 M. & W. 353; 16 M. & W. 885. "The Judge of the Division Court," said Robinson, C.J., at p. 487 of 18 U.C.R., "was bound to act upon what appeared before him, and cannot be made a trespasser by proof of facts given at any other time or in any other court."

At p. 489 of the same report, Burns, J., says: "It appears to me the plaintiff, by suffering judgment by default against him, is not in a position to dispute the jurisdiction of the court. If the want of jurisdiction was apparent upon the proceedings, then of course it would be open for him to question the right upon any steps taken upon a proceeding in that manner, as *coram non judice*; but I do not think he can question the jurisdiction, by bringing evidence to dispute the place where the cause of action arose in whole or in part, after he has acquiesced in it in whole by suffering judgment by default; and in an action against the judge, the judge of the County Court would be in a serious predicament if he were obliged to be prepared with evidence to sustain his judgments against persons simply because it be shown that the parties sued do not reside within his county. The effect of what the plaintiff contends for in this case would compel the judge to do that, if such a proposition be established. The plaintiff should have appeared to the summons, and have raised the question, and the judge would then have tried the question of jurisdiction; or if he did not wish the judge of the County Court to have determined the point, he might have applied to one of the Superior Courts for a prohibition."

As regards judges and judicial officers, the general rule is that if they do any act beyond the limit of their authority, causing injury to another, they are liable for it: *The Marshalsea Case*, 10 Rep. 76; *Nichols v. Walker*, Cro. Car. 394; but if the act be done within that limit through an erroneous or mistaken judgment, they are not liable: *Dowsell v. Impey*, 1 B. & C. 163; *Garner v. Coleman*, 19 C.P. 106. Trespass will not lie for a judicial act done without jurisdiction, unless the judge knew or had the means of knowing of it: *Calder v. Halkett*, 3 Moo. P.C. 28; *Garner v. Coleman*, 19 C.P. at p. 109; *Kemp v. Neville*, 10 C.B.N.S. 545, and cases there cited. Judicial functions cannot be delegated: *Andrews v. Marris*, 1 Q.B. 3. A Superior Court can order a county judge to proceed with the hearing of a case, but cannot deal with any order which he may make: *Churchward v. Coleman*, L.R. 2 Q.B. 18; *Coolican v. Hunter*, 7 P.R. 237; *Re Jackson v. Clark*, 36 C.L.J. 68. The signature to a judge's order need not be by the hand of the judge himself. If impressed with a stamp by the clerk in his presence it is good: *Blades v. Lawrence*, L.R. 9 Q.B. 374. Words spoken by a county judge sitting on the trial of a cause, though irrelevant to that matter, are not actionable: *Scott v. Stansfield*, L.R. 3 Ex. 220; *Munster v. Lamb*, 11 Q.B.D. 588. No action lies against the judge of a Superior Court for a judicial act, though alleged to have been done

maliciously and corruptly: *Floyd v. Barker*, 12 R. 23; *Groenvelt v. Burwell*, 1 Ld. Raym. 454; *Fray v. Blackburn*, 3 B. & S. 576; *Ward v. Freeman*, 2 Ir. C.L.R. 460; *Hind v. Brett*, W.N. (1883) p. 37. A judge cannot try a cause in which he is interested: *R. v. Meyer*, 1 Q.B.D. 173. But even in a case of imputed interest he is not incapacitated from making an order if refusing to do so would be a denial of justice: *Grand Junction Canal Co. v. Dimes*, 18 L.J. Ch. 365; 19 L.J. Ch. 345. The Lord Chancellor was held disqualified to hear a case in which a company were plaintiffs, owing to the fact that he had an interest as a shareholder: *Dimes v. Grand Junction Canal Co.*, 3 H.L.C. 759; see also *London & North Western Railway Company v. Lindsay*, 3 MacQueen H.L. Cas. 99; *Ex parte Medwin*, 1 E. & B. 609; *R. v. Cambridge (Recorder)*, 8 E. & B. 637; *R. v. The Justices of Suffolk*, 18 Q.B. 416; *R. v. Rand*, L.R. 1 Q.B. 230; *Hayman v. The Governors of Rugby School*, L.R. 18 Eq. 28; *Bigelow v. Bigelow*, 6 P.R. 124. A counsel in a cause, who is afterwards raised to the Bench, is not precluded from taking part in the hearing and discussion of that cause, but he may properly decline: *Thellusson v. Rendlesham*, 7 H.L.C. 429. Private communications to a judge upon a matter publicly before him are highly improper, and amount to contempt of court: *Re Dyce Sombre*, 1 Mac. & G. 116.

An attachment will not lie against a County Court Judge for not obeying a *certiorari*, unless it clearly appears that he acted contumaciously: *Re Judge of Niagara District*, 3 O. S. 437. Nor can he be arrested on mesne or final process: *Adams v. Ackland*, 7 U.C.R. 211. A County Court Judge cannot refuse to attend under a subpoena *duces tecum* to produce a deed, on the ground of private business, or that he obtained the deed, or became possessed of his information as an attorney, or that he had a lien on the deed or was entitled to witness fees as an attorney: *Deadman v. Ewen*, 27 U.C.R. 176. He cannot directly or indirectly practice as a counsel, attorney or solicitor, notary public or conveyancer, under penalty of forfeiture of office and a further penalty of \$400: R.S.O. c. 54, s. 8; see also *Allen qui tam v. Jarvis*, 32 U.C.R. 56. Change of venue was ordered in ejectment where a County Court Judge was defendant, where plaintiff might otherwise have proceeded under Overholding Tenants' Act: *Anon*, 4 P.R. 310.

As to the effect of the death of the judge in cases pending, see *Leslie v. Emmons*, 25 U.C.R. 243; *Hoey v. McFarlane*, 4 C.B.N.S. 718; *Applebe v. Baker*, 27 U.C.R. 486.

Should the junior judge be sick, absent or otherwise unable to hold the Division Court, it would be the duty of the senior judge, under this sub-section, to hold the court.

By the R.S.O. c. 54, s. 15, it is provided that, "at any sittings of the County Court at the same time as the sittings of the Court of General Sessions of the Peace, or of a Division Court in any county, or of any two of the said courts at the same time, either the senior or junior judge, or both of them, may, if the senior judge thinks fit, preside in any of the said courts, or each of them in one of said courts at the same time, so that two of the said courts may sit and the business therein be proceeded with simultaneously."

23. In case of the illness or absence of the Judge, a Judge of the County Court of any other County may hold the Court, or the first mentioned Judge may appoint some Barrister of the Bar of Ontario to act as his deputy; and the Judge of such other County or the Barrister so appointed shall, as Judge of the Division Court, during the time of his

Who to pre-
side in case
of illness or
absence of
Judge.

appointment, have all the powers and privileges, and be subject to all the duties vested in or imposed by law on the Judge by whom he has been appointed. R.S.O. 1887, c. 51, s. 22.

Illness or Absence.—The absence of the judge need not be unavoidable, nor need an order made by the barrister appointed show the reason for such appointment. The maxim, "All acts are presumed to be rightly done," applies: *Re Hawkins*, 3 P.R. 239. The general presumption of law, namely, that a person acting in a public capacity was properly appointed and duly authorized to act prevails in all such cases until the contrary is shown by the person disputing it: *R. v. Fee*, 3 O.R. 239; *McKenzie v. Dancey*, 12 A.R. 317. By R.S.O. c. 54, s. 16, the judge may, "if he sees fit, perform any judicial duties in any county other than his own, on being requested to do so by the judge to whom the duty for any reason belongs." Full power and authority is given to such judge to perform all judicial duties which could have been performed by the judge of the county: sec. 18 of same statute. It was contended in *Wilson v. McGuire*, 2 O.R. 118, that the authority thus given was *ultra vires* of the Provincial Legislature, but the contention was not sustained, and it was held that the Legislature had complete power over Division Courts. In *Gibson v. McDonald*, 7 O.R. 401, it was held that a judge of one county could not preside at the Court of General Sessions in any other county.

By 54-55 Vic. c. 28 (Canada), it is provided—(1) that the jurisdiction of every county judge shall extend and shall be deemed to have always extended to any additional territory annexed by the Provincial Legislature to the county or district for which he was or is appointed to the same extent as if such additional territory were originally a part of his county; and (2) that it shall be competent for any County Court Judge to hold any of the courts in any county or district in the province, or to perform any other duty upon being required so to do by the Governor-in-Council, at the request of the Lieutenant-Governor of such province; and he is authorized, without any such order, to perform any judicial duties in any county or district in the province, on being requested so to do by the County Court Judge, to whom the duty for any reason belongs."

It was held by the Supreme Court that similar provisions in an Act passed by the Legislature of British Columbia to those contained in the Ontario Act, R.S.O. c. 54, s. 16, were *intra vires* of the Provincial Legislature, irrespective of 54 Vic. c. 28, and that sec. 92 (14) of the British North America Act, giving power to the Provincial Legislature to provide for the institution, maintenance and organization of Provincial Courts includes power to define the jurisdiction of such courts territorially, as well as in other respects, and that necessarily involves the jurisdiction of the judges who constitute such courts: *Re County Courts of British Columbia*, 21 S.C.R. 446.

A deputy judge is not precluded from practicing his profession: R.S.O. c. 54, s. 11; see *Reid v. Drake*, 4 P.R. 141.

The following rules are deducible from the case of *Re Leibes v. Ward*, 45 U.C.R. 375, where a junior judge had, under this section, appointed a barrister to hold the sittings of a particular Division Court for him. (1) That the word "judge" includes the junior judge; (2) that the deputation held good until the work of the particular court was complete; (3) that a deputy judge so appointed had power to appoint a subsequent time and place in the county, though not in the division of the court, for subsequent delivery of judgment; (4) that the deputation itself clothed the deputy judge so appointed with all the powers, within the county of junior judge. See also *Gibson v. McDonald*, 7 O.R. 401; *Baker v. Cave*,

i H. & N. 674; Margate Pier Co. v. Hannam 3 B. & Ald. 266; Waterloo Bridge Co. v. Cull, 1 E. & E. 213; Applebe v. Baker, 27 U.C.R. 489; Hoey v. McFarlane, 4 C.B.N.S. 718 and 732.

24. The County Judge so appointing or the Barrister so appointed deputy shall forthwith send to the Lieutenant-Governor notice of the appointment, specifying the name, residence, and profession of the Deputy Judge, and the cause of his appointment. R.S.O. 1887, c. 51, s. 23.

Lieutenant-Governor to be notified of appointment of Deputy.

Forthwith.—The word "forthwith" in matters of procedure means within twenty-four hours: Morton v. Bank of Montreal, 18 C.L.T. 157. The term has sometimes received a free construction and sometimes a strict one according to circumstances. An act has sometimes been held to have been done "forthwith" when done within a reasonable time and sometimes only when done with the least possible delay: per Armour, C.J., Maxwell v. Scarfe, 18 O.R. 531. The notice under this section should be sent by the judge or barrister appointed with as little delay as possible.

25. No such appointment shall be continued for more than one month without a renewal of the like notice; and in case the Lieutenant-Governor disapproves of the appointment, he may annul the same. R.S.O. 1887, c. 51, s. 24.

Duration of appointment.

One Month.—This is a calendar month: R.S.O. c. 1, s. 8 (15); exclusive of the day on which the appointment was made: Lester v. Garland, 15 Ves. 248; Hanns v. Johnston, 3 O.R. 100.

26. In case the Judge or the acting Judge, from illness or any casualty, does not arrive in time or is not able to open a Division Court on the day appointed for that purpose, the Clerk or Deputy Clerk of the Court shall, after eight o'clock in the afternoon, by proclamation, adjourn the Court to an earlier hour on the following day, and so from day to day, adjourning over any Sunday or legal holiday, until the Judge or acting Judge arrives to open the Court, or until he receives other directions from the Judge or acting Judge. R.S.O. 1887, c. 51, s. 25.

Adjournment of Court if Judge does not arrive in time.

Judge or Acting Judge.—See sec. 23.—The word "casualty" may be taken to mean some unforeseen accident or other cause preventing the judge's attendance.

Holiday.—This includes Sunday, New Year's Day, Good Friday, Easter Monday, Christmas Day, Dominion Day, the day appointed for the celebration of the birth of Her Majesty and Her Royal Successors, Labor Day and any day appointed by proclamation of the Governor-General or Lieutenant-Governor as a public holiday or for a General Fast or Thanksgiving: R.S.O. c. 1, s. 8 (16).

A judgment entered on any such day would perhaps be questioned: Trust and Loan Co. v. Dickson, 2 L.J.N.S. 166; Connelly v. Bremner, L.R. 1 C.P. 537, but a case may, if all parties consent, be tried on any day except Sunday; Foster v. Toronto Ry. Co. 31 O.R. 1.

CLERKS AND BAILIFFS, ETC.

Every Court to have clerk and bailiffs.

27. For every Division Court there shall be a clerk and a Bailiff or Bailiffs, who shall be British subjects, and shall respectively perform the duties of their office as regulated by Act of the Legislature and by rules or orders made by the Board of County Judges. R.S.O. 1887, c. 51, s. 26.

Clerks and Bailiffs.—These are the executive officers of the court. As a general rule all sane persons are capable of holding office: 2 U.C.L.J. 63. A clerk and bailiff could not be the same person: 2 U.C.L.J. 64. Persons under 21 years of age are deemed by law incapable of the skill necessary in such an office: 2 U.C.L.J. 64. If there is more than one bailiff each should work independently of the other: 2 U.C.L.J. 64 and cases there cited.

Duties.—A refusal to perform the duties of his office without color of right would be a misdemeanor, punishable with fine or imprisonment or both: Rosecoe's Crim. Evi., 11th Ed. 783. So also would acts totally illegal committed by a bailiff under color of his office: R. v. Wyatt, 1 Salk. 380; R. v. Bembridge, 3 Doug. 327; R. v. Borron, 3 B. & Ald. 434; R. v. Tisdale, 20 U.C.R. 272; Parsons v. Crabbe, 31 C.P. 151.

Appointment of clerks and bailiffs.

28. The Lieutenant-Governor may appoint, during pleasure, the Clerk and Bailiff or Bailiffs of any Division Court. R.S.O. 1887, c. 51, s. 27.

During Pleasure.—The words authorizing the appointment of any public officer includes the power of removing him or appointing another in his stead in the discretion of the authority in whom the power of appointment is vested: R.S.O. c. 1, s. 8 (26). See section 31.

As to removal of a clerk appointed by the judge, see section 30.

Clerk not to practice as barrister, etc.

29. No Clerk of a Division Court shall practise as a Barrister or Solicitor. R.S.O. 1887, c. 51, s. 28.

Practice as a Barrister or Solicitor.—If a practicing barrister or solicitor be appointed he must cease practice immediately. He could not even continue a suit in which he might be engaged. A clerk who directly or indirectly practices as a barrister or solicitor in contravention of this provision would be liable to a penalty of \$2,000 and the forfeiture of his office: R.S.O. c. 174 s. 30.

The appointee would also be liable to indictment for its disobedience: R. v. Sainsbury, 4 T.R. 451; 2 R.R. 433; R. v. Davis, Sayer, 133; R. v. Arnoldi 23 O.R. 201; Russell on Crimes, 5th ed. 193; Burbidge's Crim. Dig. 109-114; Rosecoe's Crim. Evi. 782. There would appear to be nothing to prevent a clerk from acting as a conveyancer or notary public.

The question as to what is practicing as a barrister or solicitor is discussed in Law Socy. v. Maedougall, 13 O.R. 204; 15 A.R. 150; 18 S.C.R. 203. Strong, J., said at p. 212, "The only way in which I can conceive a solicitor can be said to practice as such in the courts is by exercising the functions of a solicitor, by taking on behalf of a client some of the regular steps of procedure in an action or some other judicial proceeding:" see also Law Society v. Waterlow, 8 App. Cas. 407; *Re Horton*, 8 Q.B.D. 434; *Allen qui tam v. Jarvis*, 32 U.C.R. 56: see *Apothecaries Co. v. Jones*, (1891) 1 Q.B. 89, in which it was held that the words "act and practice" were directed against an habitual or con-

timorous course of conduct. A person does not act as a solicitor by merely settling an affidavit for a person in his employ; *Re Louis, Ex parte Incorporated Law Society*, (1891) 1 Q.B. 640.

30. The Judge of the County Court may at pleasure suspend or remove any Clerk or Bailiff within his own County heretofore appointed by a Judge. R.S.O. 1887, c. 51, s. 29.

Removal of clerk or bailiff by Judge.

Appointed By a Judge.—Prior to 5th March, 1880, clerks and bailiffs were appointed by the judges who had express power of removal. These are the clerks and bailiffs referred to in this section. Such clerks are eligible to sit and vote as members of the Legislative Assembly: R.S.O. c. 12, s. 8 (4); but clerks appointed by the Government are not: *Ib.* s. 8 (1).

31. The Lieutenant-Governor may, upon the report of the Inspector or of the County Court Judge, dismiss from office for misconduct or incompetency any Clerk or Bailiff heretofore appointed. R.S.O. 1887, c. 51, s. 30.

Dismissal of clerks and bailiffs.

Misconduct or Incompetency.—As to "misconduct" see sec. 285 and notes thereto, what amounts to "incompetency" must be determined with reference to each particular case. That which might be considered "incompetency" in a clerk or bailiff of a city office where a large amount of business is done, might not be so in a country office where suits are few.

32.—(1) Nothing in this Act contained shall relieve the County Judge from the responsibility of seeing that the officers of his Court perform their duties, or from examining into complaints which may be made against them, or from the duties imposed upon him in reference to the security to be given by Clerks and Bailiffs, and such last-mentioned duties are declared and shall be held to be of a judicial and not of an administrative character.

Duty of County Court Judges.

(2) The Judge may for any cause suspend any Clerk or Bailiff appointed by the Lieutenant-Governor, and in case of such suspension by him, he shall forthwith report the same and the cause thereof to the Provincial Secretary; and in case a vacancy shall occur in the office of Clerk or Bailiff within his County, the Judge shall forthwith notify the Provincial Secretary thereof. R.S.O. 1887, c. 51, s. 31.

Suspension of clerk or bailiff by Judge.

Judge's Responsibility.—The responsibility of the judge with reference to the securities was formerly of an administrative character; see *Park v. Davis*, 10 C.P. 229, now it is a judicial one, very different in its nature and responsibility from the other: see notes to section 22.

Suspend for Cause.—That is, for some misconduct in his office. The suspension must be reported "forthwith" to the Provincial Secretary: see notes to section 24; *Jenkins v. Cook*, 1 P.D. 80.

Inspector
may grant
leave of
absence to
clerks or
bailiffs.

33. Leave of absence may be granted by the Inspector of Division Courts to any Clerk or Bailiff for a period not exceeding two months. In the event of leave of absence being so granted to any Clerk, he may from time to time, with the approval of the Inspector, appoint a deputy to act for him with all the powers and privileges, and subject to like duties. He may remove such deputy at his pleasure, and the Clerk and his sureties shall be jointly and severally responsible for all the acts and omissions of the deputy. R.S.O. 1887, c. 51, s. 32.

Leave of Absence.—The power of the legislature to delegate its authority in this way was at one time subject to doubt: *R. v. Hodge*, 46 U.C.R. 141; *R. v. Severn*, 2 S.C.R. 70. But it is now settled that such enactments are not *ultra vires* of the provincial legislature: *Hodge v. The Queen*, 9 App. Cas. 117; *Sulte v. Three Rivers*, 11 S.C.R. 25; *Re The Liquor License Act*, 1883, 5 C.L.T. 66; *Citizens Ins. Co. v. Parsons*, 7 App. Cas. 98; *Cope v. Scottish Union Co.*, 5 B.C.R. 329; *R. v. Halliday*, 21 A.R. 42; *Verratt v. McAulay*, 5 O.R. 313.

The time mentioned would begin from the posting of the inspector's letter granting leave: *Dunlop v. Higgins*, 1 H.L.C. 381; *Household Fire Ins. Co. v. Grant*, 4 Ex. D. 216; *Union Fire Ins. Co. v. Fitzsimmons*, 32 C.P. 602; *O'Donohue v. Wiley*, 43 U.C.R. at p. 363; *Frey v. Wellington M. Ins. Co.*, 4 A.R. 293. The day of posting the letter would be excluded: *Young v. Higgon*, 6 M. & W., 49; see also *McCrea v. Waterloo M. Fire Ins. Co.*, 26 C.P. 437; 1 A.R. 218; *Ex parte Whitton*, *Re Greaves*, 13 Ch. D. 881.

Appointment of Deputy Clerk.—The clerk may have as many assistants as he thinks necessary, but he cannot appoint more than one deputy at a time, but may have several in succession during the time he is absent on leave: See *Stroud*, 313; *Neilson v. Jarvis*, 13 C.P. 176, the words "from time to time" being construed to mean, "as often as he pleases." Proceedings in all matters may be taken in the name of the clerk, "by A. B., deputy clerk," or in the name of the clerk himself: *Westbrook v. Miller*, 22 N.W. Rep. 256. His authority ends with the expiration of the clerk's tenure of office, and on the death or removal of the clerk his authority would cease. The fees pertaining to the office would belong to the clerk, and any rights therefor would be in the name of the clerk. The deputy cannot have more or less power than the principal, and all duties which the clerk could perform should be performed by him: *Parker v. Kett*, 1 Salk. 95; *Godolphin v. Tudor*, 2 Salk. 468; *Re Hoey v. McFarlane*, 4 C.B.N.S. 718.

Any assistant clerks which may be employed by the clerk would be held in law to be the principal's deputy when doing any particular act under his direction. But it is doubtful if they would have power to sign process, take affidavits, approve instruments, take confessions, record judgments, or do such things as the Legislature evidently trusted to be done by the clerk himself. The term "deputy" applies only to one who has all the authority which the principal has by virtue of his office. He is one who acts by the rights, in the name of and for the benefit of someone else; he is a mere servant of his principal, though he has the power, by operation of law, to do any act which his principal might do (1 Salk. 95); and by making a deputy the whole power of the principal passes to him: 2 Salk. 468; see 1 Salk. 96; *R. v. Smith*. *Farr*. 78; 9 U.C.L.J. 32, 33.

As to responsibility of sureties, see section 36.

34. The Clerk may (with the approval of the Judge), from time to time, when prevented from acting by illness or other unavoidable accident, appoint a deputy to act for him, with all the powers and privileges and subject to like duties, and may remove such deputy at his pleasure, and the Clerk and his sureties shall be jointly and severally responsible for all the acts and omissions of the deputy. R.S.O. 1887, c. 51, s. 23.

When clerk may appoint deputy.

Illness or other Unavoidable Accident.—It will be noted that the authority of the clerk to appoint a deputy under this section is limited to the causes stated, e.g., "illness, etc."

35. Where a Bailiff is temporarily unable to perform the duties of his office from illness, leave of absence or other temporary disability, he may from time to time, with the approval of the Inspector of Division Courts, appoint a deputy to act for him, with all the powers and privileges and subject to like duties, and may remove such deputy at his pleasure, and the Bailiff and his sureties shall be jointly and severally responsible for all the acts and omissions of the deputy. No such appointment shall have force for a longer period than two months. R.S.O. 1887, c. 51, s. 34.

Appointment of deputy by bailiff.

Appointment of Deputy Bailiff.—See notes to section 33. The appointment under this section can only be made under the conditions specified in the statute. Leave of absence may be granted by the inspector: section 33. The judge is not specifically empowered to suspend or remove a deputy bailiff, but probably where a bailiff could be removed or suspended by the judge, so also could be his deputy.

With the approval of the inspector, a new appointment of the same person could probably be made from time to time at the expiration of every two months.

36. Subject to the provisions of section 24 of *The Act Respecting Public Officers*, every Clerk and Bailiff of a Division Court shall give security, by a covenant according to the form in Schedule A to this Act, or in words to the same effect, with so many sureties, being freeholders and residents within the County, and in such sums as the County Judge directs, and, under his hand, approves and declares sufficient. Provided always that the Lieutenant-Governor in Council may increase or diminish the sum or sums for which, any Clerk or Bailiff heretofore, or who may hereafter be appointed, shall be required to give security as aforesaid. R.S.O. 1887, c. 51, s. 35; 60 V. c. 14, s. 3.

Clerks and bailiffs to give security. Rev. Stat. c. 16.

The Act respecting Public Officers.—The following are the provisions here referred to:

"24.—(1) Whenever a Sheriff, Registrar, Division Court Clerk or Bailiff, or other public officer, is required to give security for the

performance of his duties, or other security of a like nature, and whether such security enures for the benefit of the Crown or of any person injured by the default or misconduct of such officer, the Lieutenant-Governor in Council may, by Order-in-Council, direct that the bond or policy of guarantee of any incorporated or joint stock company empowered to grant guarantees, bonds, covenants or policies for the integrity and faithful accounting of public officers, or other like purposes, and named by such Order-in-Council, may be accepted as such security, upon such terms as may be determined by the Lieutenant-Governor in Council; and the provisions of law with reference to the legal effect of such securities when given by individuals, to the filing thereof, and to the mode of proceeding thereon, shall apply to the security given by every such company.

(2) The interim receipt of the company may be accepted in lieu of the formal security, but the formal security shall be completed within one month." R.S.O. 1887, c. 15, s. 24. See R.S.O. c. 16, s. 15 in notes to section 43.

Section 25 provides that every such covenant shall enure for the benefit of Her Majesty; and Her Majesty may bring and maintain an action thereon in respect of any damages suffered by Her Majesty or by the public on account of any misconduct, neglect or default of the officer in either instance, with the like effect as a private person suffering damages as aforesaid might and may also sue in any other mode by which Her Majesty may sue upon a covenant.

Affidavit of Justification.—For form of affidavit of justification by sureties, see Form 261. The affidavit of justification and due execution of the bond may be sworn before a justice of the peace or a commissioner for taking affidavits to be used in the High Court: R.S.O. c. 16, s. 26.

Increase or Diminish the Sum.—The Government reserve the right to increase or diminish the amount of the security to be given by the officers. See note *supra*.

Who May Be Hereafter Appointed.—This provision applies only to officers whose appointment dates subsequently to 13th April, 1897, the Act containing it being 60 Vic. c. 14, assented to on that date.

Security.—By rule 2 (20), "Security Covenant" means the covenant required to be furnished by a clerk or bailiff of a Division Court in pursuance of any statute requiring security from such officer.

By rule 180 the clerk is required to report in writing to the judge at every sitting of the court as to the several sureties of himself and the bailiff or bailiffs of his court showing whether any of them have died, become insolvent, or left the county since his last report, and mentioning any facts connected therewith which ought to be made known to the judge. By section 41 the judge is required to notify the clerk or bailiff of the death, residence out of the province or insolvency of a surety, and if the security is not renewed within one month after notice the office is forfeited. See R.S.O. c. 16, s. 15 in notes to section 43.

The word "security" shall mean sufficient security, and where these words are used one person shall be sufficient therefor, unless otherwise expressly required: R.S.O. c. 1, s. 8, (20).

As to the object of this security, see 8 U.C.L.J. 263 and 9 U.C.L.J. 9.

Covenant.—It is a joint and several covenant and enures to the benefit of "any person suffering damages by the default, breach of duty or misconduct of the clerk or bailiff:" section 38. When sued on in the Division Court, the particulars must be according to Form 18: Rule 6.

The joint suretyship of the other surety is part of the consideration for the contract of each, and any release of one would be a release of the other: *Bonserv v. Cox*, 4 Beav. 379; *Ward v. National Bank of New Zealand*, 8 App. Cas. 764; but if the rights against the other surety are reserved he is not discharged: *Thompson v. Lack*, 3 C.B. 540; *Kearsley v. Cole*, 16 M. & W. 128; *Dewar v. Sparling*, 18 Gr. 637.

Words to the Same Effect.—A substantial compliance is all that is required: *Re Allison*, 10 Ex. at p. 568, *per Parke, B.*; *R. v. Hyde*, 7 E. & B. 859 (note); *Eggington v. Lichfield (Mayor &c.)*, 5 E. & B. 100; *R. v. Justices of Cheshire*, 3 D. & L. 337; *Henry v. Armitage*, 12 Q.B.D. 257; *Trunn v. Dixon*, 17 P.R. 375; *R.S.O. c. 1, s. 8*, (35). It is usually a great deal safer to follow the form given by the statute, when applicable, than to attempt to make any improvement in it.

Sureties.—The word "sureties" means sufficient sureties: *R.S.O. c. 1, s. 8*, (20). An infant cannot be a party to the bond: *Fisher v. Mowbray*, 8 East, 330; *Baylis v. Dinely*, 3 M. & S. 477; *Stikeman v. Dawson*, 16 L.J. Ch. 205; 1 DeG. & Sin. 113; nor would he be bound even if he fraudulently represented himself to be of age: *Bartlett v. Wells*, 1 B. & S. 836. A married woman may be one of the sureties *R.S.O. c. 163, s. 4*, but it might not be well to approve of such a bond.

A person is not incapable of being elected a member of the legislature by reason of his being surety for a clerk or bailiff: *R.S.O. c. 12, s. 12* (1).

As a general rule, the sureties on an official bond, are liable for the faithful performance of all duties imposed upon such officer whether by laws enacted previous or subsequent to the execution of the bond which properly belong to and come within the scope of the particular office. They are not, however, liable for after imposed duties which cannot be presumed to have entered into the contemplation of the parties at the time the bond was executed: *Brandt on Suretyship*, sec. 469; *Green v. Ponton*, 8 O.R. 471; *Gray v. Ingersoll*, 16 O.R. 194; *Middlesex v. Smallman*, 19 O.R. 349; 20 O.R. 487.

A clerk or bailiff and his sureties would be liable for the acts of all deputies, and assistants and clerks: *R. v. Stanton*, 2 C.P. 18; *Verratt v. McAulay*, 5 O.R. 313.

THE SCOPE OF THE COVENANT.

Form and Effect.—The covenant is "that (the clerk or bailiff) shall duly pay over to such person or persons entitled to the same all such moneys as he shall receive by virtue of the said office, and shall and will well and faithfully do and perform the duties imposed upon him by law, and shall not misconduct himself in the said office to the damage of any person being a party to any legal proceeding." The liability attaches only if a legal appointment has been made and the sureties are not estopped from showing that no legal appointment has been made: *Kepp v. Wiggett*, 10 C.B. 35. The default or misconduct charged must be such as is contracted against and within the scope of the officer's duties: *Warre v. Calvert*, 7 A. & E. 154; *King v. Norman*, 4 C.B. 884; *McIntosh v. Jarvis*, 8 U.C.R. 532.

Default in Paying over Money.—Any moneys received by virtue of his office are within the covenant; *e.g.*, bailiffs fees received by a clerk and not paid over: *Cool v. Switzer*, 19 U.C.R. 199. The state of the account between the plaintiff and the officer is binding on the sureties; where, therefore, a clerk had been credited with fees on account for goods sold him by plaintiff, it was held that the sureties were not entitled to credit therefor against moneys not paid over: *Franklin v. Gream*, 20 U.C.R. 84; see Rule 164. If moneys have been received by an officer

which he was not by law entitled to demand, and which he could not be compelled to accept, *e.g.*, as an indemnity, the sureties will not be liable therefor: *Kero v. Powell*, 25 C.P. 448; *Preston v. Wilmot*, 23 U.C.R. 348. Money received "by virtue of his office" is such as is received for the purpose of being paid over to a party in a legal proceeding, and which money, at the time of its being received by the officer, was so received to the use of such party: *per Gwynne, J.*, 25 C.P. 453. The moneys must be actually received: *Canada West F. M. & S. Ins. Co. v. Merritt*, 20 U.C.R. 444; *Corp. of Rawdon v. Ward*, 27 U.C.R. 609; *Montefiore v. Lloyd*, 15 C.B.N.S. 203. Payment otherwise than in money will not discharge a debtor, so that a personal set-off against the officer, though agreed to by him, would not, of itself, render the sureties responsible; though, if the debt were lost, they might be liable for the officer's neglect: see *Fraser v. Gore District M. F. Ins. Co.*, 2 O.R. 416. The sureties would be liable for interest: *Ackermann v. Ehrensperger*, 16 M. & W. 99. Though money may not in the first instance, be received "by virtue of the office," it may afterwards become so, as where a bailiff seized and sold a stranger's goods, and then took interpleader proceedings concerning the proceeds, which resulted in an order of the court to pay the money to the stranger: *McArthur v. Cool*, 19 U.C.R. 476. A receipt of money by a deputy would render the sureties responsible: section 32; *Veratt v. McAulay*, 5 O.R. 313. Where a clerk directed money to be remitted to him by a banker's draft, and gave a receipt therefor, it was held to amount to a payment to him, though the banker failed before presentment; but *quare*, whether it would have been a receipt within the covenant had his sureties been sued: *McLeish v. Howard*, 3 A.R. 503.

Non-Performance of Duties.—Wherever by the Act or Rules a duty is imposed upon a clerk or bailiff and he neglects that duty, and the person to whom he owes the duty is damaged without any want of care on his part, the sureties will be liable. As a general rule damage is the essence of the action, and if the evidence shows that had the duty been performed the plaintiff would have derived no benefit, the action must fail: *Hobson v. Tuelluson*, L.R. 2 Q.B. 642; *Brown v. Wright*, 35 U.C.R. 378; *Nerlich v. Malloy*, 4 A.R. at p. 435. But for the non-performance of some duties, nominal damages may be given, *e.g.*, the neglect of a bailiff to return an execution within three days after the return day thereof under section 288: see *Nerlich v. Malloy*, 4 A.R. 430. A bailiff is not liable for not seizing goods, of the presence of which in his bailiwick, he has no notice: *Yourrell v. Proby*, 2 Ir. R.C.L. 460. In an action against a bailiff for not seizing goods, he may prove that the goods were covered by a chattel mortgage and he will not then be liable: *Stimson v. Farnham*, L.R. 7 Q.B. 175. He is not bound to use extraordinary exertion or provide against an unexpected or unforeseen contingency: *Hodgson v. Lynch*, 5 Ir. R.C.L. 253. Where an execution is issued under section 107 to the bailiff of a court within the county, other than that in which the action is brought, it is necessary to show that the goods were "in or near to" the division of such bailiff: *Davy v. Johnston*, 31 U.C.R. 153. When the bailiff fails to execute a warrant of commitment, or allows the debtor to escape, not only the debtors own resources but all reasonable probabilities formed upon his position in life and surrounding circumstances, that the debt, or any portion of it, would have been discharged if he had been taken or remained in custody, may be taken into account: *MacRae v. Clarke*, L.R. 1 C.P. 403; but where the debtor was insolvent, nominal damages only were given: *Brown v. Paxton*, 19 U.C.R. 426. There must be proof of negligence: *Nelson v. Baby*, 14 U.C.R. 235. If the bailiff take insufficient sureties on a replevin bond he will be liable to all damages naturally flowing therefrom, not exceeding the penalty of the replevin bond: *Norman v. Hope*, 13 O.R. 556; 14 O.R. 287; see *Yea v. Lethbridge*, 4 T.R. 433; 2 R.R. 425, where the value of the goods was held to be the limit of recovery: see note in 2

R.R. 426. If a bailiff does not exact payment of his fees in advance his sureties are, nevertheless, liable: *Bank of Ottawa v. Smith*, 16 L.J.N.S. 223.

Misconduct.—By the express terms of the covenant, damage is of the essence of an action for misconduct. Selling a debtor's goods contrary to orders from the creditor would be misconduct: *Sloan v. Creasor*, 22 U.C.R. 127. The misconduct must be in the exercise of the duties of his office. The exaction of illegal fees, assuming to do more than the process justified, as by breaking open the door of a dwelling house, making false return to process, are instances of misconduct: *Smart v. Hutton*, 8 A. & E. 568. The sureties are not responsible for the seizure of the goods of a stranger: *McArthur v. Cool*, 19 U.C.R. 476. See notes to section 285.

Demand.—No demand is necessary upon the bailiff, except in cases falling within section 108. A clerk is not bound to transmit by post any moneys, nor to procure and transmit post-office orders therefor, except upon the request and at the expense of the party entitled thereto. Without such direction and request, all moneys are payable at the office of the clerk: *Rule 247*; *McLeish v. Howard*, 3 A.R. 506. Except by compliance with this Rule no demand is necessary: *Gibbs v. Southam*, 5 B. & Ad. 911. See notes to section 302.

Parties.—A recovery against the officer will be a bar to any action against the sureties: *Sloan v. Creasor*, 22 U.C.R. 127; *Miller v. Corbett*, 26 U.C.R. 478; *Pearson v. Ruttan*, 15 C.P. 79. To any action against the sureties the officer should be a party: *Exchange Bank v. Springer*, 29 Gr. 270; and if the action fails against the officer, it will also fail against the sureties: *Pearson v. Ruttan*, 15 C.P. 79; *R. v. McPherson*, 15 C.P. 17.

Release.—Any material increase in the duties of the officer will release the sureties: *Pybus v. Gibb*, 6 E. & B. 902; *Victoria M.F. Ins. Co. v. Davidson*, 3 O.R. at p. 383; or where the officer undertakes to the plaintiff additional liability: *Bonar v. Macdonald*, 3 H.L.C. 226; but where the duties are lessened the sureties will not be discharged: *Frank v. Edwards*, 8 Ex. 214. Where the limits of the court are changed it would be advisable to obtain new covenants: *Thompson v. McLean*, 17 U.C.R. 495; *Corp. of Ontario v. Paxton*, 27 C.P. 104. Where the amount or mode of payment by the officer is altered by agreement with the creditor, the sureties may be released: see *London & N. W. Ry. Co. v. Whinray*, 10 Ex. 77; *Bank of Toronto v. Wilmott*, 19 U.C.R. 73. See *Bristol and West of Eng. L.M. & Inv. Co. v. Taylor*, 24 O.R. 286; *Union Bank v. O'Gara*, 22 S.C.R. 404; *Worthington v. Peek*, 24 O.R. 535; *Holliday v. Hogan*, 22 O.R. 235; 20 A.R. 298; 22 S.C.R. 479. If the creditor, by arrangement with the officer, in consideration of some responsibility incurred by him, delays his right to immediate payment of money collected, the sureties are discharged: *Victoria M.F. Ins. Co. v. Davidson*, 3 O.R. 378; but mere acquiescence in irregularities will not, in itself, effect a release: *Mayor of Durham v. Fowler*, 22 Q.B.D. 394; *Shepley v. Hurd*, 3 A.R. 549; *Pirie v. Wyld*, 11 O.R. 422; see *County of Simcoe v. Burton*, 25 A.R. 478; but any extension of time to the debtor, after judgment against the surety, will not release the latter: nor will such a release be effected if the debtor agrees to obtain the sureties' consent: *Duff v. Barnett*, 17 Gr. 187; nor if the creditor reserves his rights against the surety: *Hall v. Thompson*, 9 C.P. 257; *Bell v. Manning*, 11 Gr. 142. Such reservation may be shown by oral evidence: *Currie v. Hodgins*, 42 U.C.R. 601; *Bank of Montreal v. McPaul*, 17 Gr. 234; *Gorman v. Dixon*, 26 S.C.R. 87; following *Wyke v. Rogers*, 1 De. G. & M. 408. A discharge of the debtor with a reservation of remedies against the debtor's surety, operates merely as a covenant not to sue,

and not as a release of the surety: *Donaldson v. Wherry*, 29 O.R. 552. If one of the sureties be released the other will not be liable: *Evans v. Brembridge*, 2 Jur. N.S. 134.

But the court would endeavor to construe such release as a covenant not to sue: *Dewar v. Sparling*, 18 Gr. 633; the effect of which is not to release the other: *Duck v. Mazen*, (1892) 2 Q.B. 511; see *Wolmershausen v. Wolmershausen*, 62 L.T. 541. And where a creditor has released one of several sureties with a reservation of his recourse against the others and a stipulation against warranty as to the claims they might have against the surety so released, by reason of such recourse reserved, the creditor has not thereby rendered himself liable in an action of warranty by the other sureties: *Macdonald v. Whitfield*; *Whitfield v. The Merchants' Bank*, 27 S.C.R. 94.

Several Actions.—The liability of such surety is limited to the amount specified at the foot of the covenant. The court will not, however, restrain proceedings instituted against the surety, notwithstanding several actions had been brought against him, and the aggregate amount sought to be recovered greatly exceeds the amount of his liability: *Craig v. Milne*, 25 Gr. 259; *Canada Guarantee Co. v. Milne*, 25 Gr. 261. Where several executions have been obtained, an order may be made in Chambers that upon payment to the sheriff of the amount of the sureties' total liability and the costs, further proceedings will be stayed: *Sinclair v. Baby*, 2 P.R. 117. Relief probably could be obtained by a surety admitting his liability in whole or in part under the Rules respecting Interpleader: see Consolidated Rules 1102-1128; *McElheran v. London Masonic Ben. Assn.*, 11 P.R. 181; *Reading v. School Board of London*, 16 Q.B.D. 686; *Anderson v. Barber*, 13 P.R. 21; *Leah v. Order of Chosen Friends*, 27 C.L.J. 94; notes to section 277.

Contribution.—Every surety who pays money is entitled to contribution from every other surety: *DeColyar on Guarantees*, 2nd Ed. 305-321; *Berridge v. Berridge*, 44 Ch. D. 168; *Re Macdonald, Ex parte Grant*, W.N. (1888) p. 130; and may enforce the judgment against the other for his just proportion: R.S.O. c. 145, ss. 2, 3, 4. Where the principal debtor gives to his sureties counter-security by mortgage of real estate, any of the sureties is entitled to enforce the security, after default, without the consent or concurrence of the others and it is not an answer to a claim for contribution by one surety who has paid the whole debt that the security has depreciated in value and that the paying surety has refused to take any step to enforce it: *Moorehouse v. Kidd*, 28 O.R. 35; 25 A.R. 221.

When one of two sureties has moneys in his hands to be applied towards payment of the creditor, he may be compelled by his co-surety to pay the same to the creditor or to the co-surety, if the creditor has already been paid by him: *Macdonald v. Whitfield*; *Whitfield v. The Merchants' Bank*, 27 S.C.R. 94.

Death of Surety.—Upon the death of a surety, the officer must give anew a like security within one month from notification by the county judge: see section 41. Until the new appointment, the personal representatives of the surety will be liable: *R. v. Leeming*, 7 U.C.R. 306; *Provisional Corp. of Bruce v. Cromar*, 22 U.C.R. 321; see, however, *DeColyar on Guarantees*, 2nd Ed. 348.

Rights of Surety Against Officer.—The surety will be entitled to complete indemnification by the officer, and to all securities held by the creditor, including any judgment against the officer, though obtained in the same action: R.S.O. c. 145, ss. 2, 3, 4. The judgment may be enforced without obtaining an assignment of it: *Re McMyn, Lightbown v. McMyn*, 33 Ch. D. 575. The surety is entitled to interest: *Petre v.*

Duncombe, 2 L.M. & P. 107; but cannot recover the costs of defence unless authorized by the officer to defend: *Gillett v. Rippon*, Moo. & M. 406; unless his defence was reasonable: *LeBlanche v. Wilson*, 21 W.R. 109.

Statute of Limitations.—If the action against the officer be barred under section 298, no action can be maintained against the sureties: *Pearson v. Ruttan*, 15 C.P. 79. If any action is brought upon the covenant no damages shall be recovered in the action against the surety except as to matters and causes of action which have arisen within ten years: R.S.O. c. 16, s. 27.

Freeholders.—The sureties may be either legal or equitable freeholders. An overdue mortgage on a man's land would be no bar if the equity of redemption should be worth the amount prescribed. A freeholder is one who is seized of an estate or interest in lands or tenements which may endure for ever or is limited to endure for life or lives, or for some uncertain period that may last for his life or for some other person's without being confined to a limited number of years: *Smith's Real and Personal Prop.*, 6th Ed., section 360. Persons in possession of land, under contracts for the acquisition of the freehold thereof upon the fulfilment of certain conditions, are not freeholders: *Re Flatt and Prescott*, 18 A.R. 1. As to what is an equitable freeholder see, *per Osler, J.A.*, 18 A.R. 18. Although not freeholders of the county the sureties would be liable: *Parks v. Davis*, 10 C.P. 229. They are also liable although their principal has neglected to execute the covenant: *Miller v. Tunis*, 10 C.P. 423; so, also, if the covenant has not been filed: *Parks v. Davis*, *supra*.

Residents.—Where there is nothing to show that the word is used in a more extensive sense, "resides" denotes where a person "eats, drinks or sleeps, or where his family or his servants eat, drink and sleep": *R. v. North Curry*, 4 B. & C. 959, *per Bayley, J.* It has a variety of meanings, according to the statutes in which it is used: see notes to section 84, *post*.

The term "resident" does not necessarily import permanence, nor yet any definite stay: *per Draper, C.J.*, *La Pointe v. The G.T. Ry. Co.*, 26 U.C.R. 487; but it is submitted that it here means permanently resident.

If the sureties are not resident, they are nevertheless liable: *Pearson v. Ruttan*, 15 C.P. 79.

Within the county.—*i.e.*, county or union of counties as the case may be.

In such sums.—Formerly it was held to be the duty of the judge to fix the amount for which the sureties became bound, before the clerk or bailiff entered on his duties, and if the judge should fail to perform his duty under this section, an action was maintainable against him, but not unless there was actual damage: *Parks v. Davis*, 10 C.P. 229. But the Act has since been amended (see *see*, 32), so that the responsibility which formerly attached to the judge is now merely "judicial," and not "administrative."

The sums in which the sureties are bound, should be regulated by the probable amount of business in the particular court. The usual practice is to require two sureties, but when the amount is large, it is not unusual to have three or four: 8 U.C.L.J. 121. Due regard should also be had to the increased jurisdiction of the court.

Under his hand.—The approval must be in writing: *Wilson v. Wallani*, 5 Ex. D. 155. The judge usually approves and declares the covenant sufficient in his own hand writing, but it could be done in his name by the hand of another in his presence: *Blades v. Lawrence*, L.R. 9 Q.B. 374.

Sufficient.—The judge should carefully examine the covenant, to see that it is a substantial (10 C.P. 424) compliance with the statutory form. It is not necessary, but it would be prudent to require affidavits of execution of the covenant and of justification of the sureties: R.S.O. c. 74, s. 12. See Forms 35, 361. If the name of some proposed surety should have been struck out and another substituted, the judge should reject the covenant; for if the other surety signed before the change he would be released: *Hansard v. Lethridge*, 8 T.L.R. 346; and the public are entitled to a covenant free from possible objections: *Jones v. Macdonald*, 14 P. R. 535.

Before clerk or bailiff enters on his duties, covenant to be filed with Clerk of the Peace.

37.—(1) Before a Clerk or Bailiff enters upon the duties of his office, the covenant of himself and sureties, approved as aforesaid, shall be filed in the office of the Clerk of the Peace in the County in which the Division Court is situate; and for filing and granting a certificate thereof, the Clerk of the Peace may demand from the Clerk or Bailiff the sum of \$1. R.S.O. 1887, c. 51, s. 36.

Renewal of clerks' and bailiffs' covenants.

(2) In the case of any such covenant requiring periodical renewal to keep it alive and in force, the renewal receipt granted for that purpose shall be filed with the Clerk of the Peace in whose office the covenant has been filed, and shall be attached to the covenant to which it refers. The Clerk of the Peace, for receiving and filing the said receipt, shall be entitled to receive from the Clerk or Bailiff the sum of fifty cents. 57 V. c. 23, s. 1.

Filing the Covenant.—The clerk and bailiff must be particular not to do anything of an official nature until his covenant, duly approved and declared sufficient has been filed with the clerk of the peace. Properly the covenant should be executed by the clerk or bailiff; but his omission to do so would not invalidate the security or discharge the sureties who have executed it: *Rastall v. The Attorney-General*, 18 Gr. 138. The filing is not complete until the covenant is marked "filed" by the proper officer: *Campbell v. Madden*, Dra. R. 2. But see *R. v. Gould*, 6 O.S. 26.

Covenant requiring periodical renewal.—A covenant requiring periodical renewal is a bond or a policy of guarantee of any incorporated or joint stock company empowered to grant guarantees, bonds, covenants or policies for the integrity and faithful accounting of public officers or other like purposes. Such a guarantee, bond, covenant or policy may be accepted for a Division Court clerk under R.S.O. c. 16, s. 24. See section 36 and note p. 24 *ante*.

Limitation.—See R.S.O. c. 16, s. 27, cited note p. 29 *ante*. The inspector of Division Courts exercises a watchful supervision over all covenants and clerks and bailiffs who take out policies in guarantee companies must be careful to see that the renewal receipt is punctually filed as required by this section.

Covenant to be available to suitors, etc.

38. The covenant shall be available to, and may be sued upon in any Court of competent jurisdiction by, any person suffering damages by the default, breach of duty or misconduct of the Clerk or Bailiff. R.S.O. 1887, c. 51, s. 37.

Any Court of Competent Jurisdiction.—This will depend on the amount claimed, and the nature of the action; and if in the Division Court, also the place where the cause of action arose or where the defendants reside.

See note to section 36, "Scope of the Covenant."

39. A copy of the covenant, certified by the Clerk of the Peace, shall be received in all Courts as sufficient evidence of the due execution, and of the contents thereof, without further proof. R.S.O. 1887, c. 51, s. 38.

Certified copy of covenant to be received as evidence.

Sufficient Evidence.—This applies to criminal as well as civil courts. See B.N.A. Act, sec. 129. For form of certificate, see form 212.

Without Further Proof.—This mode of proving the covenant is only cumulative evidence, not substitutionary: Taylor on Evi., 8th ed., 1319; see also Lynch v. O'Hara, 6 C.P. 259; Graham v. McArthur, 25 U.C.R. 478; Warren v. Deslippe, 33 U.C.R. 59; notes to section 43.

40.—(1) In an action, or proceeding against any person as the surety of a Clerk or Bailiff, the entries in the books required by law to be kept or which were so kept by such Clerk or Bailiff shall be *prima facie* evidence against the surety.

Entries of clerk or bailiff evidence against surety.

(2) For the purpose of this section the words "Clerk or Bailiff" shall be held to include a person who having been a Clerk or Bailiff has ceased to be such Clerk or Bailiff. R.S.O. 1887, c. 51, s. 39.

Prima Facie Evidence.—This evidence may be contradicted, if untrue. Prior to the introduction of this section, the admissibility of entries in the books kept by a clerk or bailiff as evidence in an action against his sureties was doubted. It was held admissible in Middlefield v. Gould, 10 C.P. 9, but this decision was questioned in Victoria M. Fire Ins. Co. v. Davidson, 3 O.R. 378. The authority of the former case was, however, recognized in The Corp. of Welland v. Brown, 4 O.R. 217, in which the entries made by a town collector of taxes in his roll were admitted as evidence against his sureties. It was also held in a case before the Irish courts that the entries made by a rate collector in the accounts kept by him were admissible as evidence in an action against his sureties: Abbeyleix Guardians v. Sutcliffe, 26 L.R. Ir. 332.

41. If a surety in such covenant dies, becomes resident out of Ontario, or insolvent, the County Judge shall notify the Clerk or Bailiff for whom such person became surety, of such death, departure or insolvency, and the Clerk or Bailiff shall within one month after being so notified, give anew the like security, and in the same manner as hereinbefore provided, or forfeit his office of Clerk or Bailiff. R.S.O. 1887, c. 51, s. 40.

If surety dies, etc., a new surety to be furnished.

Resident Out of Ontario.—See notes to section 36 and section 84.

Insolvent.—No provision is made for ascertaining the fact of insolvency, and difficulties may be occasioned in acting upon this section: see Temple v. Stock Exchange, 8 O.R. 705. An assignment for the benefit of creditors under the Act respecting Assignments and Preferences

by Insolvents, R.S.O. c. 147, would be an act of insolvency. When a contract was to terminate in the event of the insolvency of the vendee, it was held that insolvency meant a general inability to pay debts: *Parker v. Gossage*, 2 C.M. & R. 617; *Biddlecombe v. Bond*, 4 A. & E. 332.

Time for Filing Bond.—The month would not commence to run until the day after notice was given: *R. v. Justices of Middlesex*, 7 Jur. 396; *McLean v. Pinkerton*, 7 A.R. 490; *Ratcliffe v. Bartholomew* (1892), 1 Q.B. 161; *Dingor v. Matthews*, 65 L.T. 748. See notes to section 43.

Judge to Be Kept Informed as to Sureties.—At every sitting of the court the clerk must report to the judge in writing as to the several sureties of himself and bailiff, showing whether any of them have died, become insolvent, or left the county since his last report, and mentioning any facts connected therewith which ought to be made known to the judge: Rule 180.

Procedure
where
sureties of
clerk or
bailiff dis-
continue
suretyship.

42.—(1) Any surety for a Clerk or Bailiff who intends to withdraw from his responsibility may give notice in writing of his intention to the Clerk or Bailiff, as the case may be, and to the Judge of the County Court, which notice may be served personally or left with some grown-up person at the office or place of residence of the person to whom it is addressed, or may be deposited in Her Majesty's post office prepaid and registered and addressed to such person at his usual post office address.

(2) In such case the Judge shall forthwith on receipt thereof duly notify such Clerk or Bailiff, and the Clerk or Bailiff shall, under penalty of forfeiture of his office (in addition to the suspension hereinafter mentioned), furnish the security of a new surety in lieu of the surety so giving notice, and shall have the necessary new bond or covenant approved by the Judge and completed within one month after such notices have been so given to him and to the said Judge.

(3) If such bond or covenant shall not be so approved and completed within such month, the said Judge shall forthwith suspend such Clerk or Bailiff and report such suspension and the cause thereof to the Provincial Secretary and the Inspector of Division Courts, and all accruing responsibility on the part of the person giving such notice shall cease from and after the expiration of five weeks from the day on which such notices were so given, or the later of such notices if the same were not given on the same day. 55 V. c. 11, s. 2.

(4) Nothing herein contained shall discharge or exonerate any of the parties to such former bond or covenant from their liability on account of any matter done or omitted prior to the completion and approval of the new security or the expiration of the said five weeks. R.S.O. 1887, c. 51, s. 43; 60 V. c. 3, s. 3.

Any Surety.—See notes to section 36, "Scope of The Covenant."

The original provision for the relief of a surety was repealed by 55 Vic. c. 11, s. 2, and this section substituted for it.

Notice in Writing.—See notes to section 97.

Service of Notice.—See notes to section 103.

Office or Place of Residence.—See notes to sections 36 and 84.

Within One Month.—See notes to section 41.

Expiration of Five Weeks.—The liability, except as to all past transactions and matters, ceases at the expiration of five weeks from the time of giving notice.

Sub-section (4), it is submitted, is only declaratory of the common law: *R. ex rel. Flanagan v. McMahon*, 7 U.C.L.J. 155; see also 9 U.C.L.J. 10. The taking of a fresh covenant could not discharge any liability on the former one.

43. Sections 15 to 20, both inclusive, of *The Act respecting Public Officers*, shall, with the substitution of "The Judge of the Court" for "The Lieutenant-Governor," apply to securities given by a Clerk or Bailiff of a Division Court. R.S.O. 1887, c. 51, s. 42.

Secs. 15-20 of Rev. Stat. c. 16 to apply to securities given by clerks and bailiffs.

[See also *Cap. 16, secs. 24-27, as to acceptance of policies of Guarantee Companies.*]

The Act Respecting Public Officers.—The sections referred to in R.S.O. c. 16, have reference to the security to be given by a public officer, and are made applicable to Division Court officers. The following are the sections:

15.—(1) The Lieutenant-Governor in Council may remit the forfeiture or penalty in any case in which the failure to give security or to register and deposit any bond or security under this Act, has not arisen from the wilful neglect of the person bound to give, register or deposit the same.

(2) If it appears to the Lieutenant-Governor that the period hereinbefore limited for giving the security of a new surety as aforesaid is, in consequence of particular accidents, casualties, or circumstances, insufficient, or that by reason of the distance or loss of letters, or illness, or the refusal of any surety to give the security, or of such surety not being deemed eligible and being rejected, or any other accident or casualty, further time would be necessary to enable the security of such new surety to be given, the Lieutenant-Governor in Council may allow such further period for giving the security of such new surety as appears to him reasonable and proper.

(3) But such extended period shall in no case exceed two months beyond the period allowed by this Act, and the precise period proposed to be allowed, together with the special grounds for allowing the same, shall be either entered in the book in which the original security has been registered, or endorsed on the back of the original bond or other security itself; and the person required to give the security of such new surety shall not be subject to any forfeiture or penalty for not giving the same within the time limited by this Act, if he gives it within the extended period so allowed as aforesaid.

16.—The Lieutenant-Governor may approve of the security given by any public officer or the affidavit of justification made by his sureties and filed by him, although the same has been given or filed after the time

limited by this Act: and in such case the office or commission of such public officer shall be deemed not to have been avoided by such default, but to have remained and to remain in full force and effect.

17.—No act of any public officer of this province whose security has been given, or registered, or deposited, or the affidavit of justification of whose sureties has been filed after the time limited by this Act, shall, by such default, be void or voidable.

18.—Where the securities of the principal and sureties have been executed at different times (whether they were taken in one and the same bond, deed or other instrument, or in different ones), the period limited for registering and depositing such securities shall be estimated from the time of execution thereof by the person who was the last to execute the bond, deed or other instrument, or the last bond, deed or other instrument, as the case may be.

19.—No neglect, omission or irregularity in giving or receiving the bonds or other securities, or in registering the same within the periods or in the manner prescribed by this Act, shall vacate or make void any bond or security, or discharge any surety from the obligations thereof.

20.—All bonds or other securities hereby required to be registered and deposited, shall be registered and deposited by the proper officer, notwithstanding the period prescribed for registering and depositing the same has expired; but no registering and depositing of any bond or other security shall be deemed to waive any forfeiture or penalty, or shall exempt the person on whose behalf the same are registered and deposited, from any forfeiture or penalty, under any of the provisions of this Act.

The other sections of the same Act referred to in the note to this section are the following:

25.—Every covenant hereafter entered into for or in behalf of a Sheriff, Registrar, Division Court Clerk, or Bailiff aforesaid, in pursuance of any statute requiring security from any of such officers, or in pursuance of the preceding section, shall enure for the benefit of Her Majesty: and Her Majesty may bring and maintain an action thereon in respect of any damages suffered by Her Majesty or by the public on account of any misconduct, neglect or default of the officer in either instance, with the like effect as a private person suffering damages as aforesaid might, and may also sue in any other mode by which Her Majesty may sue upon a covenant.

26.—Where by an Act of the Legislature of this province any person appointed to any public office, or authorized to perform any official duties, is required to give or enter into any bond or other security for the proper performance of his duties, any affidavit of qualification or justification required to be made by such person, or by the sureties in any such bond and any affidavit of the due execution of such bond or security, may be made before a justice of the peace, or before a commissioner authorized to take affidavits to be used in the High Court.

27.—Where any person, company or corporation is surety for the performance by a Sheriff, Registrar of Deeds, or Clerk, or Bailiff of a Division Court, or by any other public officer, or by any person appointed to any civil office, employment or commission in any public department in the Government of this province, or to any office or employment of public trust, whether the suretyship is for the benefit of the Crown or enures for the benefit of any person injured by the default or misconduct of such officer or other person, and any action is brought upon the bond, covenant or recognizance of suretyship, no damages shall be recovered in the action against such surety except as to matters and causes of action which have arisen within ten years next before the commencement of the action.

Clerk's Duties.

44. The Clerk shall issue all summonses, which summonses shall be by him filled up and shall be without blanks either in date or otherwise at the time of delivery for service; he shall also furnish copies of the same with the notice thereon, according to the form prescribed by the general rules or orders from time to time in force relating to Division Courts. R.S.O. 1887, c. 51, s. 44.

Clerk to
issue sum-
monses and
furnish
copies, etc.

Issue all Summonses.—The summons is the commencement of the action: Rules 10 to 15, inclusive; and no valid decision or judgment can be given unless a summons is issued and served: *Thorburn v. Barnes*, L.R. 2 C.P. 401; or waived by the defendant's appearance: *Merchants Bank v. Van Allen*, 10 P.R. 358; *R. v. Smith*, L.R. 1 C.C. 110; *Blake v. Beech*, 1 Ex. D. 320; *Stoness v. Lake*, 40 U.C.R. 320, at p. 327. "A man cannot incur the loss of liberty or property for an offence by a judicial proceeding until he has had a fair opportunity of answering the charge against him, unless, indeed, the legislature has expressly or impliedly given an authority to act without that necessary preliminary," *per Parke, B.*, *Bonaker v. Evans*, 16 Q.B. 171. The rule is of *universal application*, and founded upon the plainest principles of justice, which requires the tribunal invested with power to affect the property of the subject to give that subject an opportunity of being heard: *per Willes, J.*, *Cooper v. Board of Works*, 14 C.B.N.S., 180, at p. 190. See also *Bullen v. Moodie*, 13 C.P. 126; 2 E. & A. 379; *Nichols v. Cumming*, 1 S.C.R. 395; *R. v. Cheshire Lines Com.*, L.R. 8 Q.B. 344; *R. v. Archbishop of Canterbury*, 1 E. & E. 545; *Tucker v. Collinson*, 16 Q.B.D. 562; *R. v. College of Physicians*, 44 U.C.R. 146; *Marshall v. McKee*, 17 A.R., 139, reversed on the construction of the agreement, 19 S.C.R. 16.

A summons should not be issued by the clerk where clearly the court has no jurisdiction or where the process of the court is intended to be used for improper purposes, or in an illegal manner; but it would be no part of his duty to enter into nice questions of law.

Suits to be Numbered.—Every claim must be numbered by the clerk in the order in which it is received by him, the numbering to show the standing of the suit in respect to the whole number of suits entered in the court for the then current year: Rule 148.

The issue of a summons with a blank for the name of a party, which is afterwards filled up by the bailiff pursuant to the clerk's instructions, is a mere matter of practice to be dealt with by the judge, and does not affect the jurisdiction of the court: *Re Gerow v. Hoyle*, 28 O.R. 405. But it is submitted that the summons, when delivered to the officer for service, should be a perfect process, as the provisions of the statute are imperative, and he is bound to perform this at the risk of a mandamus: *R. v. Fletcher*, 1 E. & B. 279; *Re Linden v. Buchanan*, 29 U.C.R., and cases cited post, title "*Mandamus*."

The Notice Thereon.—See section 102, forms 47 to 52.

As to further duties of clerks respecting summonses, see section 45, Rules 146 to 152.

45. The Clerk shall cause a note of all summonses, all notices filed by any party to the action, orders, judgments, executions and returns thereto, to be from time to time fairly entered in a book to be kept in his office: and shall sign his

Clerk to
keep a
record of
writs and
judgments.

name on every page of the book; and the signed entries, or a copy thereof certified as a true copy by the Clerk, shall be admitted in all Courts and places as evidence of such entries and of the proceedings referred to thereby, without further proof. R.S.O. 1887, c. 51, s. 45.

Enter in a Book.—This is what is known as the "Procedure Book;" Rule 146. As to the form of Procedure Book, see section 46. Rule 146 enumerates the books which shall be kept by the clerks. Rule 147 sums up the duties of clerks and bailiffs with reference to the Procedure Book and Fee Book, and makes provision for an index to the Procedure Book, the form of such index and the entries to be made therein. The Fee Book is also provided for in section 70. Rule 147, so far as it relates to the form of Procedure Book to be used, is superseded by section 46, introduced by 57 Vic. c. 23, s. 10, apparently with the intention of abrogating the provisions adopted by the Board of County Judges as to this form.

Shall Sign His Name.—This is imperative. If omitted, perhaps neither the original entries, certainly not copies, could be given in evidence. The statute says, "*such signed entries*;" see *R. v. Rowland*, 1 F. & F. 72.

The object is to have a complete record of everything done in each suit or proceeding before the court. Rule 146 requires that a note shall be made of all process issued, and of all orders, judgments, transcripts received, warrants, executions and returns thereto, and of *all other proceedings in every cause* and at every court. The entries should include all notices given and received, instructions received from the parties to the suit, and of the names and addresses of the plaintiff and defendant, and of their solicitors or agents. Other entries required by the rules are: Garnishee proceedings from the High Court: Rule 88; judgments and orders: Rule 125; special judgments: Rule 138; proceedings on transcripts: Rule 137; cross-judgments: Rule 144; moneys returned by bailiff: Rule 151; transferred cases: Rule 157; amendments: Rule 209; change or substitution of parties: Rule 231; leave to take any proceeding: Rule 244; appeals under Master and Servants Act: Rule 311.

Each page of the book should be signed by the clerk as soon as an entry is made on it. Every clerk should make himself familiar with the section and the rules applicable thereto.

Certified Copy to be Evidence.—For form of certificate, see form No. 212.

This section is a pretty close transcript of section 111 of the English statute, 9 & 10 Vic. c. 95, continued by section 28 of *The County Courts Act*, 1888, 51 & 52 Vic. c. 43. It has been decided under that Act that a minute of the proceedings made by the clerk, pursuant to this provision, is conclusive evidence of them, even though the judge gives evidence to the contrary: *Dews v. Riley*, 11 C.B. 434. The clerk's book, or a certified copy of entries from it, is the best, and therefore the only evidence of proceedings: *R. v. Rowland*, 1 F. & F. 72, *per* Bramwell, B.; *Roscoe's Crim. Evi.*, 11th ed., pp. 3 and 160. But see *R. v. Brompton C.C.*, 18 Q.B.D. 213; 13 App. Cas. 20, in which the above decisions do not seem to have been followed. An entry in the Procedure Book, "struck out for want of jurisdiction, on the ground of a disputed title having been sworn to," is not evidence of a judgment in replevin: *Tubby v. Stanhope*, 5 C.B. 790. The entries made by a clerk in pursuance of this section are evidence against the sureties of such clerk: *Middlefield v. Gould*, 10 C.P., at p. 14; see *Carmarthen and Cardigan Ry. Co. v. The Manchester and Milford Ry. Co.*, L.R. 8 C.P., at p. 69; section 40 and notes.

A certified copy of minutes expressed to be of proceedings before a deputy of the County Court Judge, was held to be sufficient evidence of the regularity of his appointment on an indictment for perjury: *R. v. Roberts*, 38 L.T. 690.

46. The Procedure Book, and Foreign Procedure Book, to be kept by the Clerk, may be in the respective forms contained in Schedules B and C to this Act. 57 V. c. 23, s. 10.

Books to be kept by clerks.

Procedure Book.—See notes to section 45, and Rules 146, 147. The clerk of a Division Court embracing a city or part of a city shall keep a separate book, in which he shall enter from day to day all fees, charges and emoluments received by him by virtue of his office, showing the sums received by him for fees, charges and emoluments of all kinds whatsoever: Rule 147 (*h*).

47. The Clerk shall also issue all warrants and writs of execution filled up and without blanks; he shall tax costs, subject to the revision of the Judge, register all orders and judgments of the Court, and keep an account of all fines payable or paid into Court, and of all suitors' moneys paid into and out of Court, and shall enter an account of all fines and moneys in a book to be kept by him for that purpose, which book shall be open to all persons desirous of searching the same, and shall at all times be accessible to the Judge and Inspector. R.S.O. 1887, c. 51, s. 46.

Clerks to issue executions, tax costs and keep accounts of fines, etc.

Warrants and Writs of Execution.—All executions and warrants are to be printed on half sheets of foolscap paper: Rule 132. A mandamus will lie to compel a clerk to issue execution: *R. v. Fletcher*, 2 E. & B. 279; *R. v. Surrey C.C.*, 21 L.J.Q.B. 197.

Taxation of Costs.—The clerk is required to make out a bill of costs in detail, and the same may be endorsed upon or attached to the original summons: Rule 174. Where practicable, costs are to be taxed on the day on which the action is tried and heard, and every taxation is subject to the revision of the judge: Rule 174 (*a*). It is intended that the judge's decision on the question of the amount of costs should be obtained at the trial; and it is submitted that judges should, in all cases where the court is held out of the county town, revise the costs in each action on the day of trial.

On payment of a fee of ten cents, the clerk must furnish the party paying costs with a statement in writing, giving the items, including bailiff's fees in detail, and, when furnished with the necessary postage or postcard, must transmit the same by mail: Rule 175.

As to the question of costs, see section 213, and notes thereto.

For form of affidavit of disbursements to witnesses, see Form 40. The affidavit may be made before the clerk of any Division Court: section 149; may be made by the party or his agent, and should be in the hands of the clerk at the latest on the day before the execution is due: 1 U.C.L.J. 81. Where execution is "forthwith," a reasonable time should be allowed the successful party to put in his affidavit, and, in the case of a nonsuit or judgment for defendant, the latter is not, it is submitted, restricted as to time.

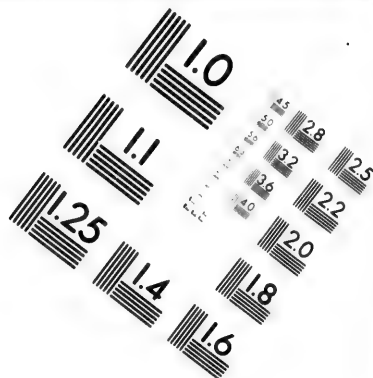
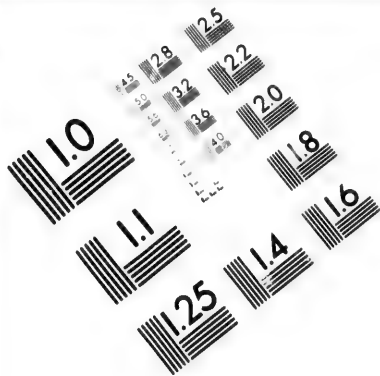
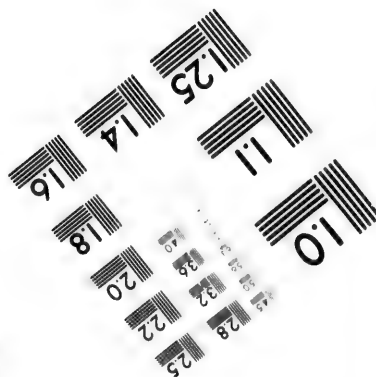
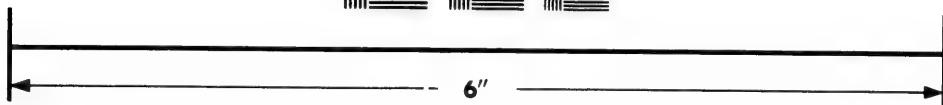
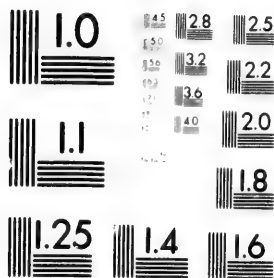


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Revision of Taxation.—It is submitted that the proper practice for revision of taxation is for the party dissatisfied to give notice to the opposite party and the clerk of the court of his intention to have the judge revise the taxation of costs on a certain day and hour. A reasonable time should be allowed. The papers in the case should be laid before the judge; and in the event of the parties not appearing, an affidavit of service of the notice of revision. Payment of costs *without* protest does not prevent a revision: *Kormann v. Tookey*, 6 P.R. 112. If an affidavit of payment of witness fees should be filed, and it should appear on revision that they had not been paid, they would be disallowed: *Hornick v. Tp. of Romney*, 11 C.L.T. 329.

Of course the judge could revise the costs on summons or appointment made by him. The clerk should exercise his best judgment on taxation, and not leave for the judge on revision that which he should properly do himself: *Simmons v. Storer*, 14 Ch. D. 154; *Hargreaves v. Scott*, 4 C.P.D. 21.

The judge cannot lay down a general practice that only costs of such witnesses as are called shall be allowed, except on an application to him: *The Cashmere*, 62 L.T. 814.

No general rule laid down by the judge is of any validity, and merely to act in obedience to such rule is not an exercise of discretion: *R. v. Marylebone C.C.*, 34 Sol. J. 459.

Fines.—See notes to sections 290 and 301.

Suitor's Moneys.—Provision is made for the account here referred to in Rule 146, by which it is provided that these entries are to be made *from day to day* in a cash book (Form G), to be kept by the clerk. Notice of the receipt of such moneys is to be given by the clerk to the person entitled thereto, under section 302 and Rule 163. By Rule 247 such moneys are payable to the parties at the clerk's office without payment of any fee whatever. If a party desires the money transmitted to him, he must give the clerk written directions as to the mode of transmission, and money so transmitted is at the risk of the party giving directions. The expenses of such transmission may be deducted by the clerk from the moneys in his hands.

Without the written directions required by this rule, no action would be maintainable against the clerk or his sureties for failure to pay moneys in his hands without demand at the office: *McLeish v. Howard*, 3 A.R. 509. The rule is incomplete, as it does not expressly impose upon the clerk the duty of transmitting the money in the manner requested by the person entitled to it. The old rule (159) required the clerk to transmit the money by post, or to procure and transmit a post office order for it. Under the present rule a question may arise as to the liability of the clerk for non-payment, without a demand being made at his office or an express refusal by him to pay the money, sufficient to waive any such demand.

See section 302 and notes thereto, and Rules 163, 164 and 247.

As to payment of money on a transcript of judgment, see Rule 248 and notes to section 223.

Claim Entered by a Solicitor or Agent.—When money is received by a clerk in a suit entered by a solicitor or agent who has paid the deposit or is responsible for the costs, such money shall not be paid out to the person beneficially interested therein, without notice to the solicitor or agent, unless upon the order of the judge: Rule 165. This practically

gives the solicitor or agent entering the claim a lien for any deposit made by him and for costs which he may have paid to the clerk or for which he is responsible. The name of the solicitor or agent who enters the claim is to be entered in the procedure book: form 4, col. 1.

Not to Take Money Except in Actions in His Own Court.—The clerk and bailiff are forbidden to receive money in any suit where the summons is merely forwarded for service: Rule 154 (b). Payment in settlement of a suit must be made to the clerk of the court in which the suit was entered or the proceedings thereof are being carried on: Rule 198; and no clerk shall be allowed to receive any money from any defendant or party to a suit in settlement or on account of any debt or costs, unless a suit has been commenced for the recovery thereof in his own court, or the claim is actually in his hands for suit, or a transcript of judgment has been sent to him from some other court: Rule 199. See notes to section 222.

48. Where the fees and emoluments earned by the Clerk or of the Bailiff of any Division Court are less than \$500 a year, the cost of all books required by this Act to be kept by him shall be paid by the county. 52 V. c. 12, s. 1.

When county to provide books.

By the County, or union of counties, as the case may be: See R.S.O. c. 1, s. 8 (12).

49. The Clerk of every Division Court shall from time to time, as often as required so to do by the County Crown Attorney of his county, and at least once in every three months, deliver to him, verified by the affidavit of the Clerk before the Judge or a Justice of the Peace of the county, a full account in writing of all fines levied by the Court, accounting for and deducting the reasonable expenses of levying the same, and any allowance which the Judge may make out of such fine, in pursuance of the power hereinafter given. R.S.O. 1887, c. 51, s. 47.

Clerks to deliver to County Crown Attorney a verified account of fines.

Verified by Affidavit.—See Form 221, which may be adapted to suit the circumstances.

50. The Clerk of every Division Court, when required by the Judge, shall, from time to time, furnish him with a full account in writing verified by the oath of the Clerk sworn before the Judge or a Justice of the Peace, of the moneys received into or paid out of the Court by any suitors or other parties under any orders, judgments or process of the Court, and of the balance in Court belonging to any such suitors or parties. R.S.O. 1887, c. 51, s. 48.

Clerk to furnish Judge with a verified account of moneys paid in and out of Court

Moneys Received.—This refers to moneys received from all sources as well as fines and forfeitures.

Clerk annually to make list of suitors' money in Court for 6 years.

51.—(1) The Clerk of every Division Court shall, annually in the month of January, make out a correct list of all sums of money belonging to suitors in the Court, which have been paid into Court and have remained unclaimed for six years before the last day of the month of December then last past, specifying the names of the parties for whom or on whose account the same were so paid.

Copy of list to be put up in court room and in clerk's office.

(2) A copy of such list shall be put up and remain at all times in the Clerk's office, and, during Court hours, in some conspicuous part of the Court House, or place where the Court is held. R.S.O. 1887, c. 51, s. 49.

[*As to return of Fees by Division Court Clerk, see Cap. 16, secs. 29, 30.*]

In the Month of January.—That is *during* that month, and properly not before it commences nor after it expires: *Beaty v. Fowler*, 10 U.C.R. 382.

Correct List of all Sums.—For form of this return see form 221.

Return to be Made Under Oath.—The list of unclaimed moneys required by this section must be made under oath according to form 221, and shall be transmitted in the month of January every year together with the moneys (if any) therein mentioned to the County Crown Attorney, and if no money remains unclaimed, the fact shall be stated in the affidavit: Rule 178.

The following are the sections of R.S.O. c. 16, referred to in the note to this section:

29. Every public officer of the province, who is by this Act or any other Act required to make a return of the fees and emoluments of his office to any department of Government, or to any officer, shall include in said return the following particulars:

(1) The aggregate amount of the fees and emoluments earned by him during the preceding year by virtue of his office;

(2) The aggregate amount of all fees and emoluments actually received by him during the preceding year;

(3) The actual amount of the disbursements during the same period in connection with his office.

30. Every clerk of a County Court, and every registrar of a Surrogate Court, and every clerk of a Division Court for a division embracing a city or part of a city, shall keep a separate book, in which he shall enter from day to day all fees, charges and emoluments received by him by virtue of his office, showing the sums received by him for fees, charges and emoluments of all kinds whatsoever, and shall on the 15th day of January in each year make, up to and including the 31st day of December of the previous year, a return to the Lieutenant-Governor, under oath, of such fees, charges and emoluments so received by him during the said year. See notes to sections 69 and 70.

Disposal of Books and Papers when Clerk changed.

52.—(1) All accounts, moneys, books, papers, and other matters in the possession of the Clerk or Bailiff by virtue of or appertaining to his office, shall, upon his resignation, removal or death, immediately become the property of the County Crown Attorney of the County in which the division is situate, who shall hold the same for the benefit of the public until the appointment of another Clerk or Bailiff, to whom he shall deliver over the same, but not until such Clerk or Bailiff and his sureties have executed and filed the covenant hereinbefore mentioned. R.S.O. 1887, c. 51, s. 50 (1); 60 V. c. 14, s. 4.

Upon resignation, removal or death of clerk, County Crown Attorney to become possessed of papers.

(2) No person shall wrongfully hold or get possession of such accounts, moneys, books, papers and matters aforesaid, or any of them; and upon the declaration in writing of the Judge presiding over the Division Court for the time being, or of the Inspector of Division Courts, that a person has obtained or holds such wrongful possession thereof, and upon the order of a Judge of the High Court, founded thereon, such person shall be arrested by the Sheriff of any County in which he is found, and shall by such Sheriff be committed to the Common Goal of his County, there to remain without bail until the High Court, or a Judge thereof, is satisfied that such person has not and never had nor held any such matters or moneys, or that he has fully accounted for or delivered up the same to the County Crown Attorney, or until he be otherwise discharged by due course of law. R.S.O. 1887, c. 51, s. 50 (2); 57 V. c. 23, s. 2.

Punishment of person wrongfully holding moneys, books or papers.

Resignation, Removal or Death of Clerk.—See sections 28 to 31 and notes thereto.

Immediately.—It is submitted that from the object and contents of this section "immediately" must be read *instantly*. See notes to section 24: Thompson v. Gibson, 8 M. & W. 281; Forsdyke v. Stone, 1 L. R. 3 C.P. 607; Stroud, 363.

County Crown Attorney.—R.S.O. c. 97.

Wrongfully Hold.—Sub-section 2 has been taken from section 48 of the Division Courts Act, to be found as chapter 19 of the Consolidated Statutes of Upper Canada. This is a quasi-criminal proceeding, and in the revision of the statutes difficulty must have been experienced in moulding the clause so as to bring it within the authority of the Provincial Legislature. It is submitted that it is within the powers of the Provincial Legislature under the B. N. A. Act s. 92 (15), authorizing the legislature to exclusively make laws for the "imposition of punishment by fine, penalty or imprisonment for enforcing any law of the province made in relation to any matter coming within any of the classes of subjects" over which the province has jurisdiction: see R. v. Hodge, 9

App. Cas. 117; R. v. Wason, 17 A.R. 221, 240; R. v. Boardman, 30 U.C.R. 553. If *ultra vires* the original section would remain in force: Atty.-Gen. for Ontario v. Atty.-Gen. for Dominion, (1896) A.C. 348.

The gist of the offence consists in the word "wrongfully," that is, in the infringement of a right: R. v. Davies, 4 L.T.N.S. 559; R. v. Brent, 1 Den. C.C. 157; Mogul Co. v. McGregor, 23 Q.B.D. 598, at p. 612; Allen v. Flood, (1898) A.C. 1; Stroud, 899.

Order of a Judge.—It must not be conditional: Chichester v. Gordon, 25 U.C.R. 527; Woltz v. Blakely, 11 P. R. 430.

Common Gaol of the County.—It must not be to the gaol of any other county than that of the sheriff arresting him: Switzer v. Brown, 20 C.P. 193; *Re Weatherly*, 4 P.R. 28; Schneider v. Agnew, 6 P.R. 338.

The person charged must either disprove the charge in the way pointed out by this section, or stand his trial, or be discharged on *habeas corpus*.

County
Attorney to
act as clerk
when office
of clerk is
vacant.

53. Upon the resignation, removal or death of the Clerk of a Division Court and until such time as his successor is appointed, the County Crown Attorney of the county in which the division is situate, shall perform all the duties, and shall have all the powers of a Clerk of a Division Court, and shall be, for the time being, and until the successor is appointed, the Clerk of such Division Court. 52 V. c. 12, s. 4.

The County Crown Attorney.—The County Crown Attorney is not required to give security. The duties imposed upon him would be enforceable by mandamus. See notes to section 44.

Duties of Bailiffs.

Bailiffs to
serve writs.

54. The bailiffs shall serve and execute all summonses, orders, warrants and writs delivered to them by the Clerk for service, whether Bailiffs of the court out of which the same issued or not, and shall so soon as served return the same to the Clerk of the Court of which they are respectively Bailiffs; but, subject to the provisions of section 85, they shall not be required to travel beyond the limits of their division, or be allowed to charge mileage for any distance travelled beyond the limits of the County in which the Court of which they are respectively Bailiffs is situated. R.S.O. 1887, c. 51, s. 51.

Duties of Bailiffs.—The word "bailiff" applies to the deputy or acting bailiff: Rule 2 (9). Besides the provisions of the statute as set out in this and the following sections, there are various other duties which the bailiff is required to perform and which are designated in the sections of the Act and the rules applicable to the proceedings to which such duties refer. The first thing a bailiff should do is to make himself familiar with these sections and rules and with the decisions of the courts in respect to them, so that in the performance of his duties he will be enabled to act intelligently and in the confidence that what he is doing is the proper thing to do under the circumstances in which he is placed.

The bailiff should attend at the clerk's office regularly to receive instructions from the clerk as to matters which may require his attention and to receive summonses and other process for service. He is required to attend every sitting of court: section 55, rule 184; to keep a book (form 11) to be called "The Bailiff's Process Book," in which he must enter every warrant or execution delivered to him for execution, and what he has done thereunder, and if not executed according to the exigency thereof, why it was not so executed, and he is required to give full information at all reasonable times to any party interested as to the execution or non-execution of such warrant or execution: rule 185. He is also required to keep a "Fee Book" (form 12) and enter therein from day to day all fees, charges and emoluments received by him by virtue of his office: section 68, rule 147 (c), and to make a return under oath to the inspector on the 15th January in each year of the aggregate amount of fees, &c., so received up to the 31st December of the previous year, and which he has become entitled to receive and has not received during the year: section 68, rule 147 (f). He is to keep a cash book (form 13) in which all payments of moneys received by him are to be entered: rule 189. A bailiff may doubtless call in assistance, when necessary, in the execution of his duty, and every assistant acting under his direction will be within the protection of the statute: section 293. Such assistants are also referred to in sections 284, 294 and 295; see 2 U.C.L.J. 85; 9 U.C.L.J. 68, 69.

The bailiff will best consult the interests of suitors and observe his duty who quietly but firmly performs his unpleasant work, not with an oppressive hand but in a kindly and becoming manner, neither courting the favor of the creditor nor exciting the ill-will of the unfortunate debtor. Reasonable forbearance may frequently be the means of obtaining a debt, while harshness and severity will often produce a fruitless execution. But there should be no temporizing or unnecessary laxity allowed in carrying out the provisions of the law with respect to the process of the court. Complaints are frequently made that bailiffs do not use due diligence in the service of summonses, and it is thought by many that no remedy exists for such neglect. This is wrong. Every bailiff receiving a summons for service must *promptly* serve the same and *immediately* after service make a return to the clerk: Rule 183. This contemplates that there must be no delay either in the service or the return.

If the proceedings in a suit are hindered or delayed by the neglect or misconduct of a clerk or bailiff, such clerk or bailiff forfeits his fees in the suit and must in addition pay any loss or damage resulting from the delay: Rule 195. Delay in the service or return of the summons will, therefore, not only subject the bailiff to loss of his fees, but he and his sureties are liable to any damages resulting from such delay. Executions should also be promptly returned or renewed, as required by the statute and rules, and clerks should see that the strict letter of the law is carried out in this respect. The practice of renewing executions without instructions from the execution creditor is a dangerous one and may involve unpleasant consequences to the clerk and bailiff as well as their sureties. The provisions of section 227 and rule 185 should, therefore, be carefully followed. See also notes to sections 36 and 227.

It is highly improper for bailiffs to canvas parties for their votes in political elections: *per* Morrison, J., North Victoria Election Case, 1 Hodgins' E.C. 612.

Service of Process.—The bailiff is made responsible for the service and execution of all process, but he is not bound to travel out of his own division. If he intends to refuse to serve or execute any process on this ground he should notify the clerk and refuse to receive the same. He has no rights in any other county unless the case falls within section 85.

He may effect service in another county but cannot charge mileage for any distance travelled beyond his county. It does not seem essential to the service of the summons that it should be made by the bailiff of the court; if duly made by any literate person it is apprehended that such service would be sufficient, though no charge could be taxed for the service or mileage unless made by an authorized person. In practice it is not unusual to appoint a person a bailiff (*pro hac vice*) to effect a particular service where the circumstances warrant such a course; and in that case the regular expense of the service would be chargeable in the usual way: 9 U.C.L.J. 68, 69. But the latter expedient could only be adopted by complying with the provisions of section 35.

If a return is not made to the clerk within six days after service of the summons showing the mode of service, the bailiff is liable to forfeit his fees for the return and attendance and for making the affidavit of service. If the time for service has expired before service is effected the summons must be returned to the clerk with a statement of the reason for non-service in writing endorsed upon it: Rule 183; in which case the clerk must add a new notice of the sittings of the court at the foot of the summons: Rules 190, 191. See also rules 17, 18 and 192, and sections 82, 100 and 101, and notes thereto.

All process of execution and warrants must be executed by the bailiff personally: 9 U.C.L.J. 69; see *Re Hendry*, 27 O.R. 297. See notes to section 249.

Bailiff to Report at Every Sitting of the Court.—At every sitting of the court, and at such other times as the judge shall require, the bailiff shall deliver to the clerk a statement, under oath, (Form 239) of every warrant and writ of execution in his hands, and of what shall have been done since his last return under every warrant and writ of execution, which he shall have been required to execute: Rule 193. This statement must be laid before the judge at the opening of every court: Rule 179; and the clerk must file it in his office, where it may be inspected by any person interested: Rule 194. Within ten days after the receipt of such statement the clerk is required to endorse thereon a memorandum in the form given in the rule, if the statement be found correct, and if incorrect he must forthwith give notice thereof to the judge, and if no return be made he shall notify the judge: *Ib.*

55. Every Bailiff shall exercise the authority of a constable during the actual holding of the Court of which he is a Bailiff, with full power to prevent breaches of the peace, riots or disturbances within the court-room or building in which the Court is held, or in the public streets, squares or other places within the hearing of the Court, and may, with or without warrant, arrest all parties offending against the meaning of this section, and forthwith bring the offenders before the nearest Justice of the Peace, or any other judicial officer having power to investigate the matter or adjudicate thereon. R.S.O. 1887, c. 51, s. 52.

Bailiff's Functions at Sittings.—The bailiff must attend every sitting of the court and see that all suitable preparations are made for the proper accommodation of the court. He must make all necessary proclamations, preserve order, call the parties and witnesses, and perform such other duties as may be imposed by the judge: Rule 184. He is invested with the authority of a constable during such sittings; but his authority in

Bailiff to exercise duty of constable during holding of Court.

this respect is limited to the duties here prescribed. As to what are "streets, squares or other places," within this section, see *Nutter v. Acyrington Local Board*, 4 Q.B.D. 375; *R. v. Wellard*, 14 Q.B.D. 63; *Attorney-General v. Toronto*, 10 Gr. 437; *Stroud*, 762. See also *R. v. Local Board of Goole*, (1891) 2 Q.B. 212; *Attorney-General v. Plate Glass Co.*, 1 Anst. 39. It is submitted that any open area in a city, town or village, dedicated to the uses of the public, would be a "square" within the meaning of this clause.

The power of a constable to apprehend and detain offenders is much greater than that of private persons. He may exercise all the powers of the latter, and his right to apprehend persons indicted for felony is undoubted: 1 East, P.C. 298-300. Constables can apprehend persons on a reasonable suspicion of felony: *Samuel v. Payne*, Doug. 359; 1 East, P.C. 301; 2 Hale, P.C. 83, 84, 89. It has always been considered that a charge of felony made by a person not manifestly unworthy of credit is sufficient to justify the apprehension: 1 East, P.C. 302. The peace officer should always make such enquiries as experience teaches him are best suited to ascertain the nature of the offence.

A constable is justified in arresting any person he finds committing any offence: Criminal Code, s. 27. He cannot arrest after a breach of the peace without continued pursuit, if all danger of an affray is past: *Roscoe's Crim. Evi.* 11th ed. 246.

Private persons are sometimes bound to give aid and assistance to a peace officer, and are liable to indictment if they refuse: *R. v. Sherlock*, L.R. 1 C.C. 20. And if they assist they are protected equally with the constable who is making the arrest: *Pollock on Torts*, 101, 102. A constable is not excused if he arrest the wrong person. He must lay hands on the right person at his peril, the only exception being on the principle of estoppel, when he is misled by the party's own act: *Glasspole v. Young*, 9 B. & C. 696; *Dunstan v. Paterson*, 2 C.B.N.S. 495. A constable has no right to handcuff a prisoner before conviction, unless he has attempted to escape, or it be necessary to do so to prevent him from escaping: *Hamilton v. Massie*, 18 O.R. 585; *Wright v. Court*, 4 B. & C. 596.

Breaches of the Peace.—These are offences against the public which are either actual violations of the law, or constructively so, by tending to make others break it: *Wharton*, 101.

Forthwith.—See notes to section 24.

Nearest Justice.—This being a penal statute it must be construed with reasonable strictness. In *R. v. Harvey*, 1 Wils., "near" was so construed in a penal statute, yet not equivalent to "next," the court remarking that "there must be a reasonable vicinity, of which the court will judge." In cities and towns where there is a police magistrate he would be the proper person: R.S.O. c. 87. If the offence is not triable summarily he is to "investigate the matter" only, but if the subject of summary conviction, then he should "adjudicate" upon it. If the disturbances, etc., occur in the court-room or while the court is sitting, and amount to an insult to the administration of justice, the judge may exercise his power of committal under section 283: *Re Johnson*, 20 Q.B.D. 68. See notes to section 293.

Fees of Clerks and Bailiffs, etc.

56.—(1) The Clerks and Bailiffs shall be paid by fees, as provided and allowed by the general rules or orders applicable to Division Courts, heretofore in force or hereafter to be made by the Board of County Judges, and approved under the provisions of section 308 of this Act.

Clerks and bailiffs to be paid by fees.

Fees of appraisers.

(2) Until otherwise provided by the general rules or orders, the fees to be taken and received by Appraisers shall be as follows:—

To each Appraiser, during the time actually employed in appraising goods (to be paid in first instance by the plaintiff and allowed in costs of the cause) Fifty cents per day.

Table of fees to be hung up in clerk's office.

(3) A table of the fees shall be hung up in some conspicuous place in the offices of the several Clerks. R.S.O. 1887, c. 51, s. 53.

Fees.—The tariff of fees, marked "Schedule of Clerk's Fees" and "Schedule of Bailiff's Fees," contains all the services for which these officers are entitled to charge: Rule 296. No local tariff or user in any particular county can give any additional right: *Re Dartnell* and the Quarter Sessions of Prescott and Russell, 26 U.C.R. 430; see *The Cashmere*, 15 P.D. 121; *R. v. Marylebone C.C.* 34 Sol. J. 459. For Schedules of Fees see forms 1 to 3; for fees in suits under \$10 see section 57.

Cases where amount involved not more than \$10.

57.—(1) In any action brought in a Division Court, when the claim sought to be recovered does not exceed \$10, it shall not be necessary that the Clerk shall notify the plaintiff that no defence has been entered, nor shall the schedule or tariff of Clerk's or Bailiff's fees now in force, or that at any time hereafter may be in force apply to or be taxable in any such action, except the fees for mileage to a Bailiff, the fees for enforcing a warrant of attachment, warrant against the body or writ in replevin, and the fee allowed by item number 24 of the schedule of Clerk's fees, for receiving papers from another division for service, entering the same, handling the same to the Bailiff, and receiving and entering his return.

Fees of clerks and bailiffs.

(2) Excepting such fees as are hereinbefore excepted, the fees taxable to and to be received by the several Clerks and Bailiffs of the Division Courts in any action in which the sum sought to be recovered does not exceed \$10, shall be as follows:—

(a) To the Clerk, for all services rendered by him as such Clerk, from the time of entering the action or suing out a judgment or interpleader summons up to and including the entering of final judgment or final order on any such judgment or interpleader summons in case the action proceeds to judgment or final order. \$1.25

In case the action does not proceed to judgment or final order the fees heretofore or that may hereafter be payable but not exceeding in the whole the said sum.

For issuing writ of execution, warrant of attachment or warrant for arrest of delinquent and entering the return thereto 50

(b) To the bailiff, for all services rendered by him as such Bailiff, in serving the summons and making his return thereof to the Clerk of the Court, or any other service that may be necessary before judgment is entered by the Clerk or pronounced by the Judge, mileage excepted 40

For enforcing writ of execution, schedule of property seized or attached, bond where necessary, and all other necessary acts done by him after seizure, mileage excepted, if money made, or case settled after levy . . . \$1.00

Necessary disbursements incurred in the care and removal of property shall be allowed, to be first allowed by the Clerk subject to the approval of the Judge. 57
V. c. 23, s. 11.

The Claim Sought to be Recovered.—The amount of the claim, not the amount of the judgment or recovery, governs the scale of costs. Should the plaintiff claim more than \$10, and succeed for \$10 or less, the judge could compel the plaintiff to pay the additional costs.

Tariff Not Applicable.—When a claim is for no greater sum than \$10 the tariff of fees (forms 1 and 2) applies only to the following items:

(a) Bailiff's fees: Form 2, items 7, 8 and 9; item 7, so far as it extends to summons in replevin, warrant of attachment, or warrant against the body.

(b) Clerk's fees: Item 28, which includes "receiving papers from another division for service; entering the same; handing to bailiff; receiving and entering his return and transmitting the same (if return made promptly, not otherwise)," 30 cents.

Notice That No Defence Entered.—The concluding clause of Rule 162 is abrogated as to suits under this section.

Fees Chargeable.—The fee of \$1.25 would appear to be chargeable, first, for all proceedings to final judgment; secondly, if a seizure is made and the goods are claimed and an interpleader summons issues and proceeds to judgment, a similar fee of \$1.25 would be taxable to the clerk; thirdly, if a judgment summons issues and proceeds to an order

\$1.25

a further fee of \$1.25 would be taxable to the clerk. A clerk may also charge a further fee of 50 cents for the enforcement of a judgment or order made in such proceedings.

The total fees chargeable in such actions would appear, therefore, to be as follows:

- | | |
|--|--------|
| (1) Proceedings up to and inclusive of judgment. | |
| Clerk | \$1.25 |
| Bailiff serving summons, return, service of
subpoena, calling case, etc | .40 |
| Clerk's fees on execution | .50 |
| Bailiff's fees enforcing execution | 1.00 |
| Mileage, 12 cents per mile. | |
| Possession, money, etc. Amount actually
disbursed to be allowed by clerk subject
to approval of judge. | |
| (2) Judgment summons, clerk's fee | 1.25 |
| Warrant for arrest and return | .50 |
| Bailiff's fees | .40 |
| Mileage, 12 cents per mile. | |
| (3) Interpleader, clerk's fees | 1.25 |
| Bailiff's fees | .40 |
| Mileage, 12 cents per mile. | |
| Keeping possession of goods, amount actually
disbursed. | |
| Costs of sale, in the event of a sale being
necessary on an interpleader under rule
37, are not provided for; but it would
seem that they could not exceed \$1.00 by
analogy to the item for enforcing writ of
execution. | |

By whom
fees to be
paid in
first
instance.

58. The fees upon every proceeding shall, on or before such proceeding, be paid in the first instance by the plaintiff, or other party at whose instance the proceeding takes place. R.S.O. 1887, c. 51, s. 54.

Every Proceeding.—The officer is entitled to his fees before being required to take any proceeding: *Re Parke v. Clarke*, 14 C.L.T. 32; Rule 297. The word "proceeding" should receive a liberal construction, and must be held to apply to every act for which a fee may be charged under the tariff. Taxing costs has been held to be a "proceeding" under a similar statute: *R. v. London, Chatham and Dover Ry. Co.*, L.R. 3 Q.B. 170; Stroud 617. This would apply to a "proceeding" as well before judgment as after: *Ross v. Farewell*, 5 C.P. 101. Taking steps to sell under an execution is a proceeding: *Neil v. Almond*, 29 O.R. 63. See *Meloche v. Kenzie*, 34 U.C.R. 606; *Caspar v. Kenzie*, 41 U.C.R. 599; *Tureotte v. Danseman*, 26 S.C.R. 578; *Caughell v. Brower*, 17 P.R. 438.

Where the clerk is entitled to a fee which has not been paid to him, and which he has not given credit for, the judge would probably refuse to hear the matter: 4 U.C. L.J. 82. If the clerk gives credit for fees he trusts to the promise of the party and waives the benefit of the section; and he could not deduct such fees from any money coming into his hands except for fees owing by the suitor in the action in respect of which the money is paid: Rule 164.

A person entering a suit for another, and becoming responsible for costs, should receive the money when recovered independently of any

claim the clerk might have against the suitor. The clerk is not bound to pay a defendant his witness fees out of money deposited by plaintiff towards costs: 4 U.C.L.J. 178.

If a clerk is indebted to a bailiff for fees in other suits the bailiff has, on that account, no right to withhold moneys collected by him: Rules 164, 185 (d). See notes to section 239.

59. If the fees are not paid in the first instance by the plaintiff or party on whose behalf such proceeding is to be had, the payment thereof may, by order of the Judge, be enforced by execution in like manner as a judgment of the Court, by such ways and means as any debt or damages ordered to be paid by the Court can be recovered. R.S.O. 1887, c. 51, s. 55.

How
enforced.

By Order of the Judge.—This is a summary proceeding and must be strictly exercised: *Fletcher v. Calthorp*, 6 Q.B. 880-891. The defaulting party must have an opportunity of being heard: *Beland v. L'Union, St. Thomas*, 19 P.R. 747; see notes to section 44. There should be a summons to show cause: *Bullen v. Moodie*, 13 C.P. 126; 2 E. & A. 379. An application must be made to the judge upon an affidavit of the facts, and a summons must issue for the party against whom the proceeding is taken to show cause why payment should not be enforced as provided by this section: Rule 299. For forms of summons and order thereon see Forms 56 and 130.

There is nothing to prevent the summons being made returnable at the judge's chambers in the county town; but it is more consistent with the spirit of Division Court law to make it returnable at some sitting of the court in which the suit was entered or proceedings taken or in the party's own division. The form of summons provided (Form 56) is made returnable at a sitting of the court. If an order be made execution may, after entry of such order in the Procedure Book, issue upon it in the same way as an ordinary judgment: see notes to section 218. For form of execution, see form 143.

The summons should be served a reasonable time before its return. The law regulating the service of summonses does not, it is submitted, apply to this section. What is a reasonable time must depend on each particular case: notes to section 104. There should be an affidavit of personal service of the summons or that it came to the knowledge of the person for whom it is intended: *Ward v. Vance*, 3 P.R. 130.

The order need not be served. The provisions of section 88 do not appear to apply to this proceeding. It is not "bringing any action in the division of which he is clerk" to take this statutory mode of collecting the costs.

Costs.—No provision is made for costs of the proceedings under this section either in the Act or rules; but it will be noticed the forms framed by the Board of County Judges provide for payment of the costs. This is probably a sufficient enactment by them to authorize the imposition of costs. The right of a judge exercising jurisdiction as *persona designata* to impose costs is conferred by R.S.O. c. 76, s. 1. See *Re Young*, 14 P.R. 303; *Re Cosmopolitan Life Assn.*, 15 P.R. 185.

60. At the time of the issue of the execution, the Bailiff's fees thereon shall be paid to the Clerk, and shall by him be paid over to the Bailiff, upon the return of the execution, and not before, but if the Bailiff does not become entitled to any

Bailiff's
fees to be
paid to
clerk when
execution
issues.

part, or becomes entitled to a part only, of such fees, the whole or the surplus shall, on demand be, by the Clerk, repaid to the plaintiff or party from whom the fees were received. R.S.O. 1887, c. 51, s. 56.

Bailiff's Fees.—See notes to section 56. This section is for the protection of the bailiff. "What the "bailiff's fees thereon" may be is a matter of uncertainty. It would seem, however, that the amount to be deposited should be such sum as the clerk could properly allow for mileage, in case the bailiff should be unable to find sufficient property to pay his fees.

At the time this clause was enacted the bailiff was not entitled to mileage and if he found no property liable to seizure his fees could have been but trifling. It was thought then that this section was framed to meet the case of a settlement between the parties, after seizure and before sale, to the prejudice of the bailiff.

In an action against a bailiff and his surety for not returning an execution within the proper time, it is no answer, after the bailiff received the execution, without exacting prepayment of his fees, to set up the non-payment in defence of the action: *Bank of Ottawa v. Smith*, 16 C.L.J. 223.

Attempts to Find Property.—Rule 298 provides that in cases where an attachment has issued against an absconding debtor, or an execution has issued against the property of a judgment debtor, and any of the parties who would be entitled to the proceeds thereof insists upon the bailiff making an attempt to find property whereby mileage and expenses are to be incurred, a deposit of the amount of the bailiff's fees must be made with the clerk, and if he makes a proper endeavor (although unsuccessful) to secure property to the satisfaction of the clerk and subject to appeal to the judge, he shall be entitled to such mileage. Prior to this the bailiff was required on receiving an execution to seize any goods or chattels of the defendant in his bailiwick, and if he returned the execution *nulla bona* he was liable in an action against him to be mulcted in damages in the event of the plaintiff proving that the defendant had goods which might have been seized: see notes to section 36, *tit.* "Non Performance of Duties." It was necessary, therefore, for a bailiff to make enquiries before returning an execution *nulla bona*, but on any such return no mileage could be allowed: 5 U.C.L.J. 82; 5 U.C.L.J. 181.

The amount of fees to be deposited under the rule could, it is submitted, be fixed on the same basis as those provided for in the statute.

The allowance of mileage by the clerk to the bailiff when his exertions are fruitless is subject to appeal, and the judge may review the clerk's finding that a proper endeavor had been made to levy.

Bailiff to
forfeit fees
if he
neglects to
return writ.

61. If the Bailiff neglects to return any process or execution within the time required by law, he shall for each such neglect forfeit his fees thereon, and all fees so forfeited shall be held to have been received by the Clerk, who shall keep a special account thereof, and account for and pay over the same to the County Crown Attorney, to be paid by him over to the Provincial Treasurer, to form part of the Consolidated Revenue Fund. R.S.O. 1887, c. 51, s. 57.

Within the Time Required by Law.—An execution must be returned within thirty days from the date thereof: section 227; rule 185 (a). Every summons is returnable on the eleventh day after service in case any of the defendants reside in the county in which the action is brought and on the sixteenth day after service when none of the defendants reside within such county: rule 16. Where any of the defendants reside within the county the summons must be served at least ten days before the return day thereof: rule 17, section 96. When none of the defendants reside within the county it must be served at least fifteen days before the return day thereof: rule 18, section 97; and in the latter case, where there are defendants having separate interests in an action, it must be served on the defendant or defendants residing out of the county at least fifteen days before the return day thereof: rule 19.

If the bailiff fails to return a summons within six days after the service of it, he forfeits his right to the fees for the return, attendance and affidavit: rule 183. As to service of summons see notes to section 103. As to service and return of summonses in foreign divisions see rule 154 and section 107. See also section 198 as to the bailiff's duty in this behalf.

The editors can only reiterate the opinion previously expressed that the bailiff should be vigilant in making returns to process or execution within the proper time, and where it is not done the forfeiture of fees should be exacted by the clerk. The latter may endanger his position by a disregard of his duty in that respect: see notes to section 54.

62. No Clerk or Bailiff shall directly or indirectly take or receive any commission, charge, expenses, fee or reward, for or in connection with the collection of any debt or claim which has been or may or can be sued in the Court for which he is so Clerk or Bailiff, except such fees as are provided by any tariff of fees under this Act. R.S.O. 1887, c. 51, s. 58.

Clerk or
bailiff not
to accept
extra fees.

Directly or Indirectly.—These words are intended to prevent colorable evasions of the prohibition. Their precise effect cannot be defined. Similar words are to be found in many contracts in restraint of trade: see *Dales v. Weaver*, 18 W.R. 993; *Jones v. Heavens*, 4 Ch. D. 636; *Palmer v. Mallett*, 36 Ch. D. 411; *Turner v. Evans*, 2 E. & B. 512; *Cook v. Shaw*, 25 O.R. 124. The addition of the words in defining the offence of an officer of a corporation "interested" in a contract is immaterial: *Todd v. Robinson*, 14 Q.B.D. 739; but see *Stewart v. Maedonald*, 11 C.L.J. 19.

Officers Must be Disinterested.—The language of the section is strict and should be carefully observed. The clerk and bailiff are strictly forbidden by the section and rules from entering into any arrangement by which they are to receive a commission for the collection of any debt or claim which could possibly be the subject of a suit in their court. No clerk or bailiff either by himself or his partner in business is permitted to act as agent for any party during the conduct of a cause in court: rule 197; and they are strictly forbidden from purchasing or having any personal interest in a suit or judgment or claim in suit in such court: rule 196.

The object is to ensure perfect impartiality on the part of the officers of the court, and it was found that such impartiality could not be depended upon in every case unless the clerks and bailiffs were strictly prohibited from having or acquiring interests in litigious matters beyond the due performance of their legitimate duties.

The execution of a landlord's warrant or a warrant under the power of sale contained in a chattel mortgage would not, it is submitted, be a contravention of these provisions: Maxwell on Statutes.

See also section 240 and notes thereto as to the purchase by these officers of goods sold under execution.

The duty of a bailiff prior to his receiving an execution is merely to serve papers entrusted to him for service; and the duty of a clerk is to collect no money unless a claim has been delivered to him for suit, or judgment has actually been recovered in another court and a transcript of it has been received by him: rule 199.

INSPECTOR.

- | | |
|--|---|
| Appoint-
ment of
inspector. | 63. The Lieutenant-Governor may, from time to time, appoint an Inspector of Division Courts, who shall hold office during pleasure, and whose duty shall be: |
| Duties. | 1. To make a personal inspection of every Division Court and of the books and court papers belonging thereto; |
| Inspection
of offices. | 2. To see that the proper books are provided, that they are in good order and condition, that the proper entries and records are made therein in a proper manner, at proper times, and in a proper form and order, and that the court papers and documents are properly classified and preserved; |
| Books, etc. | 3. To ascertain that the duties of the officers of the Division Courts are duly and efficiently performed, and that the office is at all times duly attended to by the Clerk; |
| Officers' duties. | 4. To see that lawful fees only are taxed or allowed as costs; |
| Lawful fees | 5. When directed so to do by the Lieutenant-Governor, to ascertain that proper security has been given by any Clerk or Bailiff and that the sureties continue sufficient; |
| Security by
clerks and
bailiffs. | 6. To report upon all such matters as expeditiously as may be to the Lieutenant-Governor for his information and decision. R.S.O. 1887, c. 51, s. 61. |
| Report to
Lieutenant-
Governor. | |

The Inspector.—See notes to section 33.

Proper Books.—The books to be kept by the clerk are:—(1) Procedure book; (2) cash book; (3) debt attachment book; (4) clerk's fee book; (5) judgment debtor's book; (6) order book: Rule 146; Forms 4 to 9 inclusive; (7) an index to the procedure book: Rule 147 (c). The debt attachment book is also required by section 204.

The books to be kept by the bailiff are:—(1) fee book: Rule 147 (c); Form 12; (2) the bailiff's process book: Rule 185; Form 11; (3) the bailiff's cash book: Rule 189; Form 13.

Section 70 also requires the fee book to be kept by both clerks and bailiffs.

At all Times.—This means at all reasonable times. It is suggested that registrar's hours, from ten o'clock in the forenoon until four o'clock in the afternoon, would be reasonable.

The office should be kept open every day, except Sundays and legal holidays, for the transaction of business.

Lawful Fees.—The tariff and statute prescribe *all* lawful fees: see notes to section 56.

Proper Security.—See notes to section 36.

The inspector of Division Courts may be required to discharge the duties imposed upon any other inspector: R.S.O. c. 16, s. 28.

64. When the Inspector considers it expedient to institute an inquiry into the conduct of a Division Court Clerk or Bailiff in relation to his official duties or acts, it shall be lawful for the Inspector to require the Clerk or Bailiff, or other person or persons, to give evidence on oath, and for this purpose the Inspector shall have the same power to summon such officers or other person or persons to attend as witnesses to enforce their attendance and to compel them to produce books and documents, and to give evidence, as any Court has in civil cases. R.S.O. 1887, c. 51, s. 62.

Power of inspector in making inquiry into conduct of officers.

Investigations by Inspector.—A very wide discretion is here given to the inspector. It should be carefully exercised, and only after he is satisfied that in the public interest an investigation is necessary. No preliminary requirement is necessary before the inspector makes this enquiry. It must necessarily be after the officer has at least some general knowledge of what he is charged with having done or omitted to do, and he should have a fair opportunity of explaining his conduct or answering the charge by his own evidence or otherwise.

The inquiry should not, it is submitted be *ex parte*: see notes to section 44 and 59. Whenever the inspector may deem it "expedient," the inquiry may be made by him, and all parties may be summoned to give evidence before him.

An "inquiry" is not limited to what a man can see with his own eyes: it signifies a judicial inquiry with witnesses: *Wenlock v. River Dee Co.*, 19 Q.B.D. 155.

Duties or Acts.—The "inquiry" could only extend to the officer's "official duties or acts," and not to his private conduct, except in so far as the same might affect his official position.

Summon such Officers.—The inspector has power to summon the clerk and bailiff and also to summon any "other person or persons" as witnesses. Should the officer desire any person summoned in his interest it should be done, for the inquiry should be full and complete on both sides. The inspector would have to draw up and serve a summons answering the place of a subpoena in ordinary cases (Form 58), and have the same served on the persons required to attend. If "books and documents" were required to be produced, a *duces tecum* clause would have to be inserted. See notes to sections 137 to 140 as to summoning witnesses.

It is suggested that the inspector should take notes of the evidence given before him to be reported to the Government.

65. The Division Court Clerks and Bailiffs shall, as often as required by the Inspector, produce all books and documents required to be kept by them, or that may hereafter be required to be kept by them, at the Clerk's office, for

Books, etc., to be produced for inspection.

examination and inspection: every Clerk or Bailiff shall report to the Inspector such matters relating to any cause or proceeding as the Inspector shall require. R.S.O. 1887, c. 51, s. 63.

As Often as Required.—The inspector is entitled, as of right, to see all books and documents required to be kept by clerks and bailiffs. The refusal or neglect to produce such books and documents might prove a serious matter to the clerk or bailiff refusing production of them. The fullest information should, therefore, be given by the officers, and due production of "all books and documents" made to the inspector by them.

Officers to inform inspector of their appointment, etc.

66. It shall be the duty of every Division Court Clerk or Bailiff, within five days after his appointment to office, to inform the Inspector of his appointment, his full name and post office address, the names of his sureties, their respective callings or professions, places of residence, and post office address. R.S.O. 1887, c. 51, s. 64.

Within Five Days.—The time would commence to run from the day the officer was notified of his appointment, either by the receipt of his commission or by seeing it in the *Ontario Gazette*, or by being so advised by the Provincial Secretary. The day on which such notification was received would not be included in the five days: see section 41 and notes thereto.

Full Name.—This means the Christian name or names in full as well as the surname.

Inspector to be informed of new sureties.

67. When a Clerk or Bailiff has given new sureties, as required by this Act, he shall immediately inform the Inspector of such change, giving the names of the sureties, their respective callings or professions, places of residence and post office address. R.S.O. 1887, c. 51, s. 65.

New Sureties.—See sections 41 and 42 and notes.

Immediately.—See notes to section 24.

Officers to produce certificate of filing covenant, etc.

68. Every Division Court Clerk and Bailiff shall have and keep in his possession or custody the certificate of the Clerk of the Peace named in section 37 of this Act, and shall produce the same for the information of the Inspector when required so to do. R.S.O. 1887, c. 51, s. 66.

Certificate of the Clerk of the Peace.—See notes to section 37. This requirement is imperative. The certificate should be kept in such a place that the clerk may be able to produce it to the inspector whenever required.

When Required.—A verbal request would be sufficient.

Returns.

69. Every Clerk shall, on or before the 15th day of January in each year, make a return of the business of his office for the year ending the 31st day of December preceding,

in such form and manner as the Lieutenant-Governor shall direct. R.S.O. 1887, c. 51, s. 67.

Make a Return.—This is imperative. The return should be mailed to the Provincial Secretary, at Toronto, not later than the 15th January in each year. Mailing it, postage paid, would be a compliance with the Act. See Rule 147 (i) which is an exact transcript of this section.

Clerks and bailiffs are kept well informed by the inspector as to their duties with respect to the returns to be made by them, otherwise they would doubtless experience some difficulty in determining the number of such returns they are required to make under the various statutes and rules. Provision is made for annual returns by rules 147 (f), (g), (h), (i), 176 and 177, by sections 57, 69, 70, 176, 177 and 256, and by R.S.O. c. 16, ss. 29 and 30, and R.S.O. c. 18, s. 5. Rule 147 (h), and R.S.O. c. 16, s. 30, cover the same return; section 70 and rules 148 (f) and 176, also cover the same return. Section 5 of R.S.O. c. 18, and Rule 177 apparently cover the same return, and the provisions of R.S.O. c. 16, s. 29, cover all returns to be made under the various statutes.

Every clerk for a division embracing a city or part of a city is required to keep a separate book in which all fees, charges and emoluments received by him are to be entered, and on 15th January he must make a return to the Lieutenant-Governor, under oath, of such fees, charges and emoluments so received by him during the preceding year: Rule 147 (h); R.S.O. c. 16, s. 30.

R.S.O. c. 18, regulates the income to be retained by certain public officers, including Division Court clerks, the returns to be made by such officers and the rules for the management of their offices and the powers which may be conferred upon inspectors. The following are the provisions of that Act affecting Division Courts:—

4.—(1) Every Division Court clerk shall be entitled to retain to his own use in each year all the fees and emoluments earned by him in that year up to \$1,000.

(2) Of the fees and emoluments earned by any Division Court clerk in each year he shall pay to the Provincial Treasurer the following percentages:—

- (a) On the excess over \$1,000 and not exceeding \$1,500, ten per cent.;
- (b) On the excess over \$1,500 and not exceeding \$2,000, twenty per cent.;
- (c) On the excess over \$2,000 and not exceeding \$2,500, thirty per cent.;
- (d) On the excess over \$2,500 and not exceeding \$3,000, forty per cent.;
- (e) On the excess over \$3,000, fifty per cent.

(3) Of the net income of each year over \$1,000 every Division Court clerk shall pay to the Provincial Treasurer the following percentages, namely:—

- (a) On the excess over \$1,000, not exceeding \$1,500, ten per cent. thereof;
- (b) On the excess over \$1,500, not exceeding \$2,000, twenty per cent. thereof;
- (c) On the excess over \$2,000, not exceeding \$2,500, thirty per cent. thereof;
- (d) On the excess over \$2,500, fifty per cent. thereof.

5. On the 15th day of January in each year every officer affected by this Act shall transmit to the Provincial Treasurer a return under oath of all his fees and emoluments (including his salary, if any) whether received in cash or not, and also the disbursements incident to the business of the office or offices held by him up to and including the 31st day of December of the previous year; and shall with each return transmit to the said Provincial Treasurer such portion of the fees and emoluments received by him during the preceding year as he is required under this Act to pay to the said Treasurer.

9. The disbursements of the said officers shall be subject to revision of the inspectors thereof respectively and for the purposes of such revision an inspector shall have power to take evidence and examine witnesses under oath.

Fees and Emoluments Earned.—Under section 4 (1), the clerk is entitled to \$1,000 for "his own use." This may mean net or gross earnings, and the question is whether it is intended that the clerk should first deduct from his gross receipts such necessary disbursements of his office as rent, fire, light, cost of office books, etc., or make his return on gross receipts? The Government has taken the latter view, but whether it is correct or not is an open question. The following cases are referred to on the subject: *McCargar v. McKinnon*, 15 Gr. 361; *Lawless v. Sullivan*, 6 App. Cas. 373; *Ashworth v. Outram*, 5 Ch. D. 923; *Lovell v. Newton*, 4 C.P.D. 7; *Workman v. Robb*, 7 A.R. 389; *Mersey Docks Board v. Lucas*, 8 App. Cas. 891; *Stroud*, 379.

The words "net income" in sub-section 3, are defined to mean, "the excess of all fees and emoluments, including receipts in the current year, whether on account of earnings and salary of such year, or of any former year or years after this Act goes into effect, by an officer by virtue of all his offices after deducting the disbursements incident to the business of the office or offices held by him; R.S.O. c. 18, s. 1.

A literal compliance with section 5 would seem to require that the return should be mailed on the 15th day of January in each year (see *Beaty v. Fowler*, 10 U.C.R. 382), and neither before nor after that day. The necessity for promptness in making this return, and the payment to the Provincial Treasurer of the amount, if any payable, cannot be too strongly urged upon clerks throughout the Province.

As to the particulars to be contained in such returns see notes to section 70.

Clerks to
make
returns to
inspector.

70. Every Clerk and Bailiff shall keep a separate book in which he shall enter from day to day all fees, charges and emoluments received by him by virtue of his office, and shall on the 15th day of January, in every year, make up to and including the 31st day of December of the previous year, a return to the Inspector, under oath, shewing the aggregate amount of fees, charges and emoluments so received by him, and which he has become entitled to receive, and has not received, during the year. R.S.O. 1887, c. 51, s. 68.

Shall Keep.—This is also imperative. The section applies to the bailiff as well as to the clerk. This provision is also covered by rule 146 as to the clerk's fee book, and by rule 147 (c), as to the bailiff's fee book, and 147 (f) as to the bailiff's return to the inspector.

The section appears also to cover Rule 147 (*h*) and R.S.O. c. 16, s. 30, as to the fee book to be kept by clerks in cities, and Rule 176 as to the return to be made by the clerk to the inspector.

The book should be kept closely written up. The entry of the total amount of costs in each suit, when received by the officer, it is thought would be sufficient. The entries are to be made from day to day as the fees, etc., are received by the officer. The fees earned, but not received, need not be entered. But they must be included in the return to the inspector. These returns are required for the purpose of ascertaining the amount the clerks are entitled to retain for their own use, and must contain the following particulars:

1. The aggregate amount of fees and emoluments earned by the officer during the preceding year by virtue of his office.
2. The aggregate amount of all fees and emoluments actually received by him during the preceding year;
3. The actual amount of the disbursements during the same period in connection with his office: R.S.O. c. 16, s. 29. This provision applies to all returns required to be made by every public officer of the fees and emoluments of his office.

Under Oath.—The oath may be taken by any of the persons mentioned in section 149: R.S.O. c. 73, s. 37.

JURISDICTION.

§ 1. The Division Courts shall not have jurisdiction in any of the following cases:

Cases in
which court
has no
jurisdiction

1. Actions for any gambling debt;
2. Actions for spirituous or malt liquors drunk in a tavern or alehouse;
3. Actions on notes of hand given wholly or partly in consideration of a gambling debt or for such liquors;
4. Actions for the recovery of land or actions in which the right or title to any corporeal or incorporeal hereditaments, or any toll, custom or franchise comes in question;
5. Actions in which the validity of any devise, bequest or limitation under any will or settlement is disputed;
6. Actions for malicious prosecution, libel, slander, criminal conversation, seduction or breach of promise of marriage;
7. Actions against a Justice of the Peace for anything done by him in the execution of his office, if he objects to such jurisdiction. R.S.O. 1887, c. 51, s. 69.

Jurisdiction of the Court.—The Division Courts are, from their nature, courts of limited jurisdiction. They are creatures of the statute; they possess no common law authority, as the courts of the Sovereign, but on the contrary their authority is defined and restricted by the Act of Parliament to which they owe their existence. A judge may be entirely wrong in his opinion of law on a question within his jurisdiction, and there is an entire immunity from consequences at the suit of the injured party; but, if he exceeds the authority which the legislature has con-

ferred upon him, he is liable for any wrong committed if he knew or had the means of knowing the want of jurisdiction. The jurisdiction which he exercises is conferred and limited by statute, and if the conditions precedent to its exercise do not exist the whole proceeding is *coram non judice*: *Per Lush, J., Sarjeant v. Dale*, 2 Q.B.D. 558 at p. 566; *Graham v. Smart*, 18 U.C.R. 482; *Re Cosmopolitan Life Association*, 15 P.R. 185. The omission of a duty cast upon a judge renders him liable at the suit of a person injured: *Parke v. Davis*, 10 C.P. 229. The law makes no presumption in favor of inferior jurisdictions but it will intend nothing against them: *Christie v. Unwin*, 11 A. & E. 379, *per Coleridge, J.*; *Re Clarke*, 2 Q.B. 630, *per Lord Denman*; *Bullen v. Moodie*, 13 C.P. 126, at p. 138, *per Draper, C.J.* As a general rule every circumstance required by the statute to give jurisdiction to an inferior court *must*, in other proceedings, appear on the face of the proceedings or by reasonable intendment: *R. v. All Saints, Southampton*, 7 B. & C. 785, *per Holroyd, J.*; *Gosset v. Howard*, 10 Q.B. 411; *R. v. Helling*, 1 Strange 8; *R. v. Totness*, 11 Q.B. 80; *Buecleugh v. Met. Board of Works*, L.R. 5 Ex. 221. Should a Division Court assume jurisdiction where it has none the remedy is prohibition. Should the judge refuse to consider or adjudicate on a matter within his jurisdiction the remedy is *nundamus*.

If the judge has no jurisdiction he can neither amend nor adjourn, nor do anything else; he is *coram non judice*: *Per Maule, J., Taylor v. Addyman*, 13 C.B. 316; but he may award costs: see s. 213 (2); see "Prohibition."

A defendant does not admit the jurisdiction of the court by appearing to object to the jurisdiction: *Fearon v. Norvall*, 4 D. & L. 439; *Hamlyn v. Betteley*, 6 Q.B.D. 65.

A Division Court has jurisdiction to entertain an action upon a judgment of a superior court: *Re Ebberts v. Brooks*, 11 P.R. 296; *Aldrich v. Aldrich*, 23 O.R. 374; but not if execution may be issued thereon in the High Court or County Court: 61 Vic. e. 15, s. 9.

Prohibition.—"All lawful jurisdiction is derived from and must be traced to royal authority. Any exercise, however fitting it may appear, of jurisdiction not so authorized is an usurpation of the prerogative and a resort to force unwarrantable by law. Upon both grounds, namely, the infringement of the prerogative and the unauthorized proceeding against the individual, prohibitions are by law to be granted, at any time, to restrain a court, to intermeddle with or execute anything which by law they ought not to hold plea of; and they are much mistaken that maintain the contrary": *Per Willes, J., London (Mayor) v. Cox*, L.R. 2 H.L. 239, citing *Articuli Cleri*, 3 Jac. 1; answer to 3rd objection, 2 Inst., 602; see *Jordan v. Marr*, 4 U.C.R. 53; *Worthington v. Jeffries*, L.R. 10 C.P. 379; *Furquharson v. Morgan* (1894) 1 Q.B. 552.

Prohibition will not be granted where the court sought to be affected has clear jurisdiction: *Re New Par Consols (Ltd.)*, No. 2, (1898) 1 Q.B. 669; unless it is proceeding contrary to the principle, not to the rules of common law: *Ex parte Story*, 12 C.B. 767; nor to correct an error or even injustice, if done in the exercise of jurisdiction: *Muckonochie v. Penzance*, 6 App. Cas. 443; *Re Cummings and the County of Carleton*, 25 O.R. 607; see S.C. 26 O.R. 1.

The High Court of Justice has jurisdiction to award prohibition in all matters which concern the administration of justice within Ontario as a provincial unit, but this power operates only as to the laws enacted by or which are in force in Ontario, pertaining to matters of provincial cognizance under the B.N.A. Act: *Re North Perth Election*, 21 O.R. 538, *sed quare* see 24 A.R. 467, and there is no jurisdiction, therefore, to restrain a recount of the tribunal appointed by the Dominion Parliament: *McLeod v. Noble*, 24 A.R. 459. Prohibition will be granted to a Court of Appeal where it appears they have no jurisdiction over the subject matter, even

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after they have remitted it to the court below and awarded costs against the appellant and the party applying for prohibition appealed: *Darby v. Cousins*, 1 T.R. 552; and *semble* that courts of common law have power to issue a writ of prohibition to the judicial committee of the Privy Council if it exceeds its jurisdiction: *Ex parte Smyth*, 3 A. & E. 719; but see *Chesterton v. Farlar*, 7 A. & E., p. 719; *Warren v. Sucker-man*, 3 Bulstr., p. 120; *Martin v. Mackonochie*, 3 Q.B.D. 747.

An order for prohibition cannot be granted against a tribunal on which the law confers no power of pronouncing a judgment or an order imposing a legal duty or obligation upon an individual: *Godson v. City of Toronto*, 16 A.R. 452; 18 S.C.R. 36; *Ex parte Death*, 18 Q.B. 647; *Chabot v. Morpeth*, 15 Q.B. 446, 459; *R. v. Local Government Board*, 10 Q.B. 321; *Re Bell Telephone Co.* and the Minister of Agriculture, 7 O.R. 605; *Ex parte Kingstown Commissioners*, 18 L.R. Ir. 509; see, however, *Re Paquette*, 11 P.R. 463; *Re Young*, 14 P.R. 303; *Re Simpson and Clafferty*, 18 P.R. 402.

An order for prohibition to restrain the issue of a distress warrant by a justice of the peace upon a conviction regular upon its face and within his jurisdiction was refused, such acts being ministerial and not judicial: *R. v. Ryan*, 27 O.R. 181.

Where the legislature intrusts to any body of persons, other than to superior courts, the power of imposing an obligation upon individuals, the superior courts ought to exercise as widely as they can the power of controlling those bodies of persons if they attempt to exceed the powers given them by parliament: *per Brett, L.J.*, *R. v. Local Government Board*, 10 Q.B.D. 320.

There are five classes of cases in which prohibition may be applied for:—

1. Where the court has no jurisdiction over the cause, and want of jurisdiction appears on the face of the proceedings:
2. Where the defect does not appear on the face of the proceedings:
3. Where there is jurisdiction over the subject matter, but no power to try a particular issue:
4. Where there is jurisdiction on the subject matter, but the court acts in such a manner as to be a denial or perversion of right:
5. Where the judge is interested.

Where the Defect is Apparent.—Prohibition may, where the defect appears on the face of the proceedings, be granted at any time, either before or after judgment: *London (Mayor) v. Cox*, L.R. 2 H.L. 239; *Roberts v. Humby*, 3 M. & W. 120; *Nerlich v. Clifford*, 6 P.R. 212; *Summerfeldt v. Worts*, 12 O.R. 48; *Re Judge of Northumberland*, 19 C.P. 299; *Wright v. Arnold*, 6 Man. L.R. 1; *Bank of Montreal v. Payne*, 7 Man. L.R. 270; *Brazill v. Johns*, 24 O.R. 209.

It is much better for the party to apply in the first stage than after expenses have been incurred: *Francis v. Stewart*, 5 Q.B. 994. But not after the money has been paid over, as, no further step remaining to be considered, there would be nothing to prohibit: *Kempton v. Willey*, 9 C.B. 719; *Denton v. Marshall*, 1 H. & C. 654; *Yates v. Palmer*, 6 D. & L. 283; *Re Beattie v. Holmes*, 29 O.R. 264.

If a defect of jurisdiction is distinctly brought to the notice of the judge it is the same as if it appeared on the face of the proceedings: *per Pollock, C.P.*, 1 H. & C. 659; see *Sherwood v. Cline*, 17 O.R. 30, at p. 39.

A total want of jurisdiction cannot be cured by assent of parties: *Jones v. Owen*, 5 D. & L. 669; *De Haber v. Queen of Portugal*, 17 Q.B. 213, 214; *Knowles v. Holden*, 24 L.J. Ex. 223; *Farquharson v. Morgan* (1894) 1 Q.B. 552; *Lee v. Cohen*, 71 L.T. 824.

Where a plaintiff had recovered judgment in an inferior court, which had no jurisdiction, though no prohibition had been obtained against its enforcement, it was held that he was entitled to judgment in a court having jurisdiction: *Briscow v. Stephens*, 2 Bing. 213; *Kenting v. Graham*, 26 O.R. 361. The first judgment is a nullity: *Id.* Where the defect is apparent the grant or refusal of the writ is not in the mere discretion of the court, but the court is bound to issue the writ *ex debito justicie*: *London (Mayor) v. Cox*, L.R. 2 H.L. at p. 279; *Buggin v. Bennett*, 4 Burr. 2035; *Boderham v. Ricketts*, 6 N. & M. 537; *Yates v. Palmer*, 6 D. & L. 283; and acquiescence in the proceedings of the inferior court will not defeat the right: *Farquharson v. Morgan* (1894) 1 Q.B. 552. The court must protect the prerogative of the Crown and the due course of the administration of justice by prohibiting the inferior court from proceeding in matters in which it is apparent it has no jurisdiction: *Id.*

Where the Defect is Not Apparent.—Where the defect is not apparent on the face of the proceedings and the applicant had an opportunity of raising the objection in the court below, and has allowed that court, without excuse, to proceed to judgment without setting up the objection and without moving for prohibition in the first instance, prohibition will be refused, except, perhaps, upon an irresistible case and an excuse for the delay, such as disability, malpractice or matter newly come to the knowledge of the applicant: *Broad v. Perkins*, 21 Q.B.D. 533; *London (Mayor) v. Cox*, L.R. 2 H.L. at p. 283; *Re Soules v. Little*, 12 P.R. 533; see *Re Lott v. Cameron*, 29 O.R. 70; *Farquharson v. Morgan*, (1894) 1 Q.B. 552 at p. 558; the granting of prohibition in such cases is therefore discretionary as, for instance, when the question was only as to which particular county court should entertain the action: *Elliott v. May*, 11 Man. L.R. 306; *Maxwell v. Clark*, 10 Man. L.R. 406; *Gibbs v. Chadwick*, 8 Man. L.R. 209.

Territorial Jurisdiction—Motion to Transfer.—When the objection is that the suit was brought in the wrong Division Court, objection must be by notice under section 205, and an application must be made to change the place of trial under section 91, otherwise an application for prohibition before trial will not be sustained: *Watson v. Wolverton*, 22 O.R. 58 (n); *Re Hill v. Hicks*, 28 O.R. 390; but the fact that the defendant does not apply for a transfer previously to the trial (or perhaps not at all) does not oust the right to prohibition if the court proceeds with the trial without jurisdiction: *Re Thompson v. Hay*, 22 O.R. 583; 20 A.R. 379.

Applying for Prohibition.—An application for prohibition must be made at the proper time, upon sufficient materials, by a party who has not by misconduct or laches lost his right: *London (Mayor) v. Cox*, L.R. 2, H.L. 279; *Bank of Montreal v. Poyner*, 11 C.L.T. 84.

Waiver.—If the defendant takes any step in the suit before raising the question of jurisdiction, he waives his right to prohibition: *Re Jones v. James*, 19 L.J.Q.B. 257; *Maissont (ve v. Roxborough (Tp.))*, 30 O.R. 127; *Mouffet v. Washburn*, 54 L.T. 16; see *Re Cleghorn v. Munn*, 2 C.L.J. 133.

Where leave to issue the summons was a condition precedent to jurisdiction, and the defendant appeared and raised no objection and judgment was given against him as to part of his claim, and the case adjourned to the following day, and he then objected to the jurisdiction, he lost his right to prohibition: *Moore v. Gamgee*, 25 Q.B.D. 224. See *Chase v. Sing*, 6 B.C.R. 454.

Delay.—Material delay may be a bar to the writ: *Denton v. Marshall*, 1 H. & C. 654. A delay of two months was held to be a bar: *Re Smart v. O'Reilly*, 7 P.R. 364; see *Doidge v. Mimms*, 19 C.L.T. 291. But

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where the right to prohibition exists, as where the defect of jurisdiction is apparent, it is optional with the defendant to apply at the outset or wait until the latest stage and apply so long as there is anything to prohibit: *Re Brazill v. Johns*, 24 O.R. 209; see *Re McIntosh*, 17 C.L.T. 300.

Where the defendant applied for a new trial, which was granted on payment of costs, which were not paid, and he applied after the day appointed for payment, prohibition was granted: *Robertson v. Cornwell*, 7 P.R. 297; *Re Brazill v. Johns*, 24 O.R. 209.

Where the judge at the trial before a jury submitted questions to the jury and entered a verdict therein, it was held the judge had no right to take this course at that time, but that the defendant had so acquiesced in the course taken as to debar him from obtaining prohibition: *Re Jones v. Julian*, 28 O.R. 601. So also where the applicant had cross-examined witnesses, argued the case and taken no exception to jurisdiction, prohibition was refused: *Re Burrowes*, 18 C.P. 493.

Where defendant disputed the jurisdiction but did not attend at the trial, and evidence was given sufficient *prima facie* to show jurisdiction, and a motion was made three weeks after the trial, the writ was refused: *Friendly v. Needler*, 10 P.R. 427.

Where an erroneous order was made at the request of the applicant and was acted upon, prohibition was refused: *Richardson v. Shaw*, 6 P.R. 296.

But if the court has no jurisdiction over the subject matter of the suit, the right to prohibition is not lost by entering a dispute note and taking other steps in the cause: *Lee v. Cohen*, 71 L.T. 824.

And where the subject matter is within the jurisdiction, prohibition will not be granted until some issue is raised that the court is incompetent to try: *Seabrook v. Young*, 14 P.R. 97; but see *Sewell v. Jones*, 1 L.M. & P. 525.

The motion in these cases is usually made after judgment, as the proceedings in Division Courts rarely show excess in jurisdiction. The excess may appear only in the course of the trial and judgment may follow almost as soon as the defence is understood. Under such circumstances there would be no opportunity of moving for a prohibition before judgment, and, unless the motion was allowed after judgment, the excess of jurisdiction would be without redress: *Marsden v. Ward*, 3 E. & B. 695; *Heyworth v. London*, 1 C. & E. 312.

It is no objection to prohibition that the party moving has appealed to the court in which prohibition is to issue: *Chesterton v. Farler*, 7 A. & E. 713; see *Barker v. Palmer*, 51 L.J.Q.B. 110. But where on an appeal to the High Court the appellant moved in the alternative for prohibition, the writ was refused on the ground that the latter application should have been made to a judge in chambers: *Johnston v. Galbraith*, 18 C.L.T. 58. But prohibition was granted in another case under similar circumstances: *Re Roehon*, 31 O.R. 122.

Where the applicant did not show that all the materials on which the order issued were before the court, prohibition was refused: *Re Glass v. Allen*, 26 U.C.R. 123.

Where the cause was referred by consent without objection to jurisdiction, but during the progress of the reference title to land came into question and one of the parties objected, prohibition was held to lie: *Knowles v. Holden*, 24 L.J. Ex. 223. Where a party takes the benefit of a judge's order he cannot afterwards object that it was made without jurisdiction: *Tinkler v. Hilder*, 4 Ex. 187; *Buffalo & L.H. Ry. Co. v. Hemmingway*, 22 U.C.R. 562; *Harrison v. Wright*, 13 M. & W. 816. Where a defendant sought prohibition on the ground that his co-defendant resided out of Ontario, but had not urged the objection in the Division Court and had been guilty of delay, prohibition was refused: *Re Soules v. Little*, 12 P.R. 533.

Where defendants were resident out of Ontario, but appeared at the trial and after their objection was overruled proceeded with the defence and cross-examined witnesses, prohibition was refused: *Re Guy v. The G. T. Ry. Co.*, 10 P.R. 572;

And where defendants moved to set aside the judgment and to be let in to defend they were held to have acquiesced in the jurisdiction: *Gibson v. Chadwick*, 12 C.L.T. 207.

Where a third party had not been served with process but appeared at the trial and took part in the proceedings, prohibition was refused: *Re Merchants Bank v. Van Allen*, 10 P.R. 348.

Where defendant did not negative the existence of such facts as would give the judge jurisdiction to make an order for substitutional service, prohibition was refused: *Re Hibbitt v. Schilbroth*, 18 O.R. 309.

A party does not lose his right to prohibition by obtaining from the judge a statement of the case for the opinion of a superior court: *Jackson v. Beaumont*, 11 Ex. 300.

An appeal does not necessarily prevent prohibition: *Chesterton v. Fowler*, 7 A. & E. 713; *Veley v. Burder*, 12 A. & E. 313, 314; *White v. Steel*, 12 C.B.N.S. 410; *Harrington v. Ramsay*, 8 Ex. 879; *per Burton, J.*, *Re Thompson v. Hay*, 20 A.R. 382; *Re Roehon*, 31 O.R. 122; but in *Comyn's Dig. Title "Prohibition (D)"* it is said, "but generally after an appeal a prohibition should not be allowed if the matter be not apparent, for by that the party affirms the jurisdiction." But while an appeal is pending prohibition will be refused: *Wiltzie v. Ward*, 9 P.R. 216; see also *Devonshire v. Foote, Jr.* R. 7 Eq. 365; *Barker v. Palmer*, 57 L.J. Q.B. 110; see also as to acquiescence in Jurisdiction: *Yates v. Palmer*, 6 D. & L. 288; *Winsor v. Durnford*, 12 Q.B. 603; *Ex parte Cowan*, 3 B. & A. 123; *Bank of Ottawa v. Wade*, 21 O.R. 486.

Injunction Instead of Prohibition.—The jurisdiction to grant prohibition is now conferred by the Judicature Act upon every judge of the High Court; but inasmuch as one of the main objects of the Act is to enable the court to decide, if possible, in one proceeding, all questions in dispute in the same matter and between the same parties, and to grant an injunction in all cases in which it shall appear to the court "just and convenient" so to do, the court may, in any case in which it has power to grant prohibition, grant an injunction to restrain proceedings in the inferior court: *Hedley v. Bates*, 13 Ch. D. 498; *Stannard v. St. Giles, Camberwell*, 20 Ch. D. 190; see also *G.W. Ry. Co. v. Waterford & L. Ry. Co.*, 17 Ch. D. 493.

Particular Issue.—Where the objection to jurisdiction extends only to a particular issue in the action, exception must first be taken in the court below.

The prohibition acts simply in aid of the special or inferior court, by trying what that court had no jurisdiction to try, and upon an affirmative decision, the prohibition is absolute; but upon a negative decision, there is a judgment of consultation, upon which the special or inferior court proceeds with the cause, unhampered by the objection: *London (Mayor) v. Cox*, 276.

Where a breach of contract was not within the jurisdiction, prohibition was granted as to that part of the cause of action, leaving it open to the plaintiff to proceed on amended particulars for a breach of the contract which was within the jurisdiction: *Walsh v. Ionides*, 1 E. & B. 383.

And where a plaintiff contains two claims, one of which is within the jurisdiction and the other without the jurisdiction, prohibition will be granted as to the one without the jurisdiction: *R. v. Judge of Westmoreland C.C.*, 58 L.T. 417; See *Mackonochie v. Penzance*, 6 App. Cas. 463;

Wallace v. Allen, L.R. 10 C.P. 607; Carslake v. Mapledoram, 2 Term R. 473; Gould v. Gapper, 7 P.R. 766; Ellis v. Fleming, 1 C.P.D. 237.

Where the plaintiff's claim was in excess of the jurisdiction of the court and was made up of items of an unsettled account for \$95, and interest amounting to \$14.73, it was held that the claim for interest was clearly severable from the rest and prohibition was granted for that part of the claim which brought it up to an amount in excess of \$100: *Re Lott v. Cameron*, 29 O.R. 70; *Re Elliott v. Biette*, 21 O.R. 595; *Re Trimble v. Miller*, 22 O.R. 500.

Prohibition was granted to restrain an action for the recovery of land so far as freehold, but not so far as leasehold: *Kerkin v. Kerkin*, 3 E. & B. 399.

A judge has power to strike out a count which ousts his jurisdiction, and if prohibition be applied for before trial it will only be granted as far as that count: *Fitzsimmons v. McIntyre*, 5 P.R. 119; see also *Meek v. Seobell*, 4 O.R. 553; *Hallack v. Cambridge*, 1 Q.B. 593; *R. v. Twiss*, L.R. 4 Q.B. 407.

Denial or Perversion of Right.—Prohibition may be granted where the proceedings are a denial or perversion of right. "Such, for instance, as a refusal of a copy of the libel, in which case the prohibition is only *quousque*, or refusal of a valid plea to a subject matter of complaint within the jurisdiction, in which case although, if the plea had been received, it might have been tried in the court below, yet, if it be refused, upon its validity and truth being established in the court above, the prohibition is absolute: *London (Mayor) v. Cox*, 276; *Re Elliott v. Biette*, 21 O.R. 595; *Re Trimble v. Miller*, 22 O.R. 500.

If the defendant was served, the day before any sittings, with an ordinary summons, should the judge insist on proceeding with the hearing at such sittings, prohibition would lie: *Ex parte McFee*, 9 Ex. 261; *Ex parte Story*, 12 C.B. 767; *James v. The S.W. Ry. Co.*, L.R. 7 Ex. 287; *Serjeant v. Dale*, 2 Q.B.D. 566; *Zavitz v. Mann*, 16 C.L.J. 144.

Where a judge ordered a reference without the consent of parties in a matter in which such consent was a necessary condition, prohibition was granted: *Re The London Scottish Per. Building Society*, 63 L.J.Q.B. 112.

So also where a judge made an order unauthorized by the rules: *Gould v. Hope*, 20 A.R. 347. And where a court attempts to exercise judicial functions in respect of persons not before it, it is acting without jurisdiction and prohibition will lie: *Re Hickson and Wilson*, 17 C.L.T. 303; *R. v. The Local Government Board*, 10 Q.B.D. 321.

Where a judge granted a new trial after the expiration of 14 days, contrary to section 157, prohibition was granted: *Re Foley v. Moran*, 11 P.R. 316; *Bland v. Rivers*, 19 O.R. 407; but *quære* whether application should not first be made to the judge of the inferior court to set aside the order for a new trial: *Jones' Trustees v. Gittins*, 51 L.T. 599.

Where a judge directed the jury to find for the plaintiff, the evidence being uncontradicted, it was held that he had exceeded his jurisdiction and assumed the functions of the jury, and prohibition was granted: *Re Lewis v. Old*, 17 O.R. 610; see *Jones v. Julian*, 28 O.R. 60; *Cowan v. Affie*, 24 O.R. 358; but see, also, 62 Vic. c. 11, s. 9, as section 175 (a), *post*.

Where notice in writing is a condition precedent to the continuance of the action, a court has no jurisdiction to proceed in its absence: *Re McGregor v. Norton*, 13 P.R. 223; *R. v. Arkwright*, 12 Q.B. 960; *Re McLean v. Osgoode*, 30 O.R. 430; and an insufficient notice cannot be amended: *Re Coe v. Coe*, 21 O.R. 409.

It is difficult to draw a sharp line between excess of jurisdiction and an improper exercise of it, and where the court has a discretion, prohibition will be refused: *Jackson v. Copeland*, 8 T.L.R. 259.

An order of the High Court or a judge under C.R. 838 is not a judgment for all purposes, and prohibition was granted to restrain the enforcement of a judgment in the Division Court in an action brought upon an order made in the High Court for payment of the costs of an interlocutory motion: *Kerr v. Smith*, 24 O.R. 473.

Amendment to Give Jurisdiction.—If a plaintiff be beyond the jurisdiction of the inferior court, the court has no power to amend so as to bring it within the jurisdiction: *Jordan v. Marr*, 4 U.C.R. 53; *Powley v. Whitehead*, 16 U.C.R. 589 (title to land); *Ferguson v. The Corp. of Howick*, 25 U.C.R. 555 (suit in wrong court); *Hodgson v. Graham*, 26 U.C.R. 127; *Young v. Morden*, 10 P.R. 276 (excessive claim); *Insley v. Jones*, 4 Ex. D. 16 (refusal to send to County Court when claim £50 "and interest"); *Hopper v. Wurburton*, 7 L.T.N.S. 722 (malicious prosecution, no power to change to false imprisonment); *Avards v. Rhodes*, 8 Ex. 312; 17 Jur. 71 (unadmitted set-off); *Lawford v. Partridge*, 1 H. & N. 621 (title to land); *Sherwood v. Cline*, 17 O.R. 726 (ascertainment of disputed account); *Re Hill*, 10 Ex. (amendment reducing claim to amount within jurisdiction); *Cleveland Press v. Fleming*, 24 O.R. 335 (abandonment at trial of excess); but see now rule 7. In *Greenizen v. Burns*, 13 A.R. 481, the claim in a County Court action was \$400 "and interest." Upon appeal from a verdict for plaintiff, it was held that the County Court had power to strike out the words "and interest." The court referred to *Thomas v. Hilmer*, 4 U.C.R. 527, in which the verdict was for an amount beyond the jurisdiction. "It seems to me that a claim on a record beyond the jurisdiction is more serious than an assessment for the same amount: *per* Rose, J., *Sherwood v. Cline*, 17 O.R. 37." But where the plaintiff seeks to abandon the excess over the jurisdiction, the court has jurisdiction to permit the amendment: *Re White v. Galbraith*, 12 P.R. 513; at any time before judgment; rule 7, and if the amendment is not made, prohibition will be granted only as to the excess; *Elliott v. Biette*, 21 O.R. 595; *Re Trimble v. Miller*, 22 O.R. 500; *Re Lott v. Cameron*, 29 O.R. 70; *Re Kerkin v. Kerkin*, 3 E. & B. 399; *Re Walsh and Ironsides*, 1 E. & B. 383; *Macdonochie v. Penzance*, 6 App. Cas. 463. The judge cannot of his own motion vary or discharge any final order of his own: *Re London Scottish Permanent Building Socy.*, 63 L.J.Q.B. 112.

Where there is an appeal from the ruling of the judge that is the defendants proper remedy and an application by him for a prohibition against the issue of execution on the judgment will not be granted: *Barker v. Palmer*, 8 Q.B.D. 9.

If the jurisdiction of the court is upheld the same objection cannot be again raised at the trial: *Symons v. Rees*, 1 Ex. D. 416.

Where Judge Interested.—Where a judge of an inferior court proceeds to try, by himself or his deputy, a cause in which he is himself interested, he will be restrained by prohibition: *Bac. Abr. Prohibition*, 16; *Hutton v. Fowke*, 1 Rep. 648; *Anon.*, 1 Salk. 396; but there would seem to be no objection to an uninterested deputy judge hearing the cause: *Ex parte Medwin*, 1 E. & B. 609; 17 Jur. 1178.

The fact that the plaintiff is the judge's servant disqualifies him: *Gallant v. Young*, 11 C.L.J. 217.

Upon the subject of interest of persons occupying judicial or quasi judicial positions, the following authorities may be referred to: *Vineberg v. Guardian Fire and Life Assu. Co.*, 19 A.R. 293; *Christie v. Toronto Junction*, 24 O.R. 443; *Burford v. Chambers*, 25 O.R. 663; *R. v. Collins*, 2 Q.B.D. 35; *Bennett v. Brumfit*, L.R. 3 C.P. 28; *Re Muskoka and Gravenhurst*, 6 O.R. 352; *R. v. Milledge*, 4 Q.B.D. 332; *Hill v. Manager Met. Asylum District*, 4 Q.B.D. 433; *R. v. Bishop of Oxford*, 4 Q.B.D. 245, 525; 5 App. Cas. 214; *R. v. Handsley*, 8 Q.B.D.

383; *R. v. Lee*, 9 Q.B.D. 394; *Re Vashon v. East Hawkesbury*, 30 C.P. 194, 203; *Borough of Freeport v. Marks*, 59 Penn. 253-257; *Strekert v. East Saginaw*, 22 Mich. 104-112; *Baird v. Almonte*, 41 U.C.R. 415; *Cannon v. Toronto Corn Exchange*, 5 A.R. 268; *Paley on Convictions*, 6th ed., 40-48; *Randall v. Brigham*, 7 Wallace 520; *Bradley v. Fisher*, 13 Wallace 335; *Bingham v. Cabbot*, 3 Dallas 19; *U.S. v. Lancaster*, 5 Wheaton, 434; *Slocum v. Sims*, 5 Cranch 363; *Life and Fire Insurance Co. v. Wilson*, 8 Peters 291; *Cooley on Torts*, c. 14; *Willis v. MacLachlan*, 1 Ex. D. 376; *Lowter v. Radnor* (Earl of), 8 East 113-118; *Frey v. Blackburn*, 3 B. & S. 576; *Pappa v. Rose*, L.R. 7 C.P. 525; *Tharsis Sulphur Co. v. Loftus*, L.R. 8 C.P. 1; *Stevenson v. Watson*, 4 C.P.D. 148; *R. v. Langford*, 15 O.R. 52; *R. v. Chapman*, 1 O.R. 582; *R. v. Kemp*, 10 O.R. 143; *Connec v. C.P.R. Co.*, 16 O.R. 639; *R. v. Farrant*, 20 Q.B.D. 58; *R. v. Eli*, 10 O.R. 727; *R. v. Richardson*, 20 O.R. 514.

Illustrations of Prohibition Refused.—Prohibition will not be granted in any of the following cases: Where the facts relied upon as ousting jurisdiction are not extrinsic to the adjudication which is impeached: *Colonial Bank of Australasia v. Willan*, L.R. 5 P.C. 417. Where the subject of the suit is within the jurisdiction, though matter is stated beyond the jurisdiction, unless the court is proceeding to try such matter: *Dutens v. Robson*, 1 H. Bl. 100; nor because in arriving at his decision he has incidentally to consider and adjudicate upon a claim, the amount of which exceeds the jurisdiction: *Beattie v. McDonald*, 34 C.L.J. 198; see *Read v. Brown*, 22 Q.B.D. 128. Where the matter is immaterial: *Butterworth v. Walker*, 3 Burr. 1689. For mistake of law: *Toft v. Rayner*, 5 C.B. 162; *Lexden v. Southgate*, 10 Ex. 201; *Ellis v. Watt*, 8 C.B. 614; *Re Grass v. Allan*, 26 U.C.R. 123; *Norris v. Carrington*, 16 C.B.N.S. 396; *Meredith v. Whittingham*, 1 C.B.N.S. 216, or for a mere irregularity in the proceedings: *London (Mayor) v. Cox*, L.R. 2 H.C. 276; *Dougall v. Leggo*, 1 West. L.T. 246. Where the judgment is unwise or unjust: *Zohrab v. Smith*, 5 D. & L. 639. Upon a mere matter of practice: *Foster v. Temple*, 5 D. & L. 655; *Carter v. Smith*, 4 E. & B. 696; *McLean v. McLeod*, 5 P.R. 467; *Fee v. McIlhargay*, 9 P.R. 329; *McKay v. Palmer*, 12 P.R. 219; *Backhouse v. Bright*, 13 P.R. 117; *Barker v. Palmer*, 30 W.R. 59; *Re Gerow v. Hoyle*, 28 O.R. 405; *R. v. London (Mayor) and Stock*, 62 L.J.Q.B. 589. Where it is doubtful if the jurisdiction extends to a place where an alleged offence was committed: *Re Birch*, 15 C.B. 743. Where the judgment is against law and good conscience: *Siddall v. Gibson*, 17 U.C.R. 98. For improper reception or rejection of evidence: *Winsor v. Dunford*, 12 Q.B. 603; *Re Reed v. Graham*, 25 O.R. 573; *Ex parte Higgins*, 10 Jur. 838. Where an order of committal is made against a judgment debtor who claimed to be a discharged insolvent: *Still v. Booth*, 1 L.M. & P. 440; 15 Jur. 577. That a bailiff has seized too much property: *Ex parte Summers*, 18 Jur. 522. Where in an action for false imprisonment (within the jurisdiction) the judge has, in estimating damages, considered matters the subject of malicious prosecution (beyond the jurisdiction): *Chivers v. Savage*, 5 E. & B. 697; where a court erroneously held that a debt was attachable: *Bland v. Andrews*, 45 U.C.R. 431; see *Maefie v. Hutchinson*, 12 P.R. 167; *Re the Grosvenor v. the West End Terminal Hotel Co.*, 76 L.T., p. 339; or that a debt was due: *Field v. Rice*, 20 O.R. 309; or misinterpreted a statute not going to the limits of jurisdiction: *Long Point Co. v. Anderson*, 18 A.R. 401. Where the judge refused an application for new trial, but afterwards granted a new trial for misconduct of jury without evidence to warrant such finding: *Moxon v. London Tramways Co.*, 60 L.T. 248, *sub nom.* *R. v. Judge of Greenwich County Ct.*; that the plaintiff had no existence in fact or law, and no title to sue: *Western Fair Association v. Hutchinson*, 12 P.R. 40. "The misinterpretation of

either the common or statute law is a proceeding confessedly within the jurisdiction of these (inferior) courts, and where they are bound to exercise their judgment upon the one or the other seems to be rather a matter of error to be reversed upon appeal (if any) than a ground for prohibition:" *Home v. Camden*, 2 H. Bl. 536. *Re Dyer v. Evans*, 30 O.R. 637.

Where the Jurisdiction Depends upon Contested Facts.—Where the inferior court has jurisdiction to enter upon the inquiry but erroneously finds a fact, which though essential to its order, it is competent to try, the decision cannot be reviewed: *Colonial Bank of Australasia v. Willan*, L.R. 5 P.C. 417 at p. 443; *R. v. Cunerty*, 26 O.R. 51.

The inferior court has such jurisdiction when the action is *prima facie* within its jurisdiction, *e.g.*—an action of trespass to goods: *Long Point Co. v. Anderson*, 18 A.R. 401; or for balance of an account settled by a part payment in goods, although defendant denies that goods delivered in payment: *Joseph v. Henry*, 1 L.M. & P. 388; 15 Jur. 104; or for conversion of a chattel: *Bushell v. Moss*, 11 P.R. 252; or for rent: *Crawford v. Seney*, 17 O.R. 74; and in such a case prohibition will not be granted until the judge has inquired into the facts to ascertain if the action is within the jurisdiction: *Dixon v. Snarr*, 6 P.R. 336. When the facts as to want of jurisdiction are in dispute then it would be proper to relegate the whole to the Division Court judge and for that purpose to enlarge the motion: *Re Brazill v. Johns*, 24 O.R. 214.

Nothing can be inferred to oust jurisdiction where in any aspect of the case there is jurisdiction: *English v. Mulholland*, 9 P.R. 145. See *Stephens v. Laplante*, 8 P.R. 52, where the judge had not decided the question on which jurisdiction depended, and prohibition was granted. Where the judge had decided that the parties had agreed to a set-off, prohibition was refused: *Jenkins v. Miller*, 10 P.R. 95. See also *Fleming v. Livingstone*, 6 P.R. 63.

If the judge finds the facts to be such as do not oust the jurisdiction, his finding is conclusive, and will not be reversed except upon strong grounds: *per Cockburn, C.J.*, *Elston v. Rose*, L.R. 4 Q.B. 4; *Brown v. Cocking*, L.R. 3 Q.B. 672; *Loppky v. Hopley*, 18 C.L.T. 369; 12 Man. L.R. 335; *Joseph v. Henry*, 4 Q.B. 369; but see *Liverpool Gas Light Co. v. Overseers of Everton*, L.R. 6 C.P. 414.

When the finding of fact shows jurisdiction, any wrong construction, either of an Act of Parliament or document, will not be ground for prohibition. "Within his jurisdiction he may misconstrue a statute or document, or otherwise misdecide the law as freely and with as high an immunity from correction, except upon appeal, as any other judge": *Re Long Point Co. v. Anderson*, 18 A.R. 401; *per Osler, J.A.*, 18 A.R. 408; see *R. v. McIntosh*, 17 C.L.T. 407; *Re Dyer v. Evans*, 30 O.R. 637; *Siddall v. Gibson*, 17 U.C.R. 98; *Enraght v. Penzance*, 7 App. Cas. 240; *Honan v. The Bar of Montreal*, 19 C.L.T. 377; *Chisholm v. Oakville*, 12 A.R. 225; *Re Bowen*, 15 Jur. 1196; *Re Robertson and Chatham*, 19 C.L.T. 380; see also *Sims v. Kelly*, 20 O.R. 291, decided before the appeal in *Long Point Co. v. Anderson*, and which is perhaps not law. Despite any considerations of public policy if there is jurisdiction to deal with the matter prohibition will not lie: *Re Hyde v. Caven*, 19 C.L.T. 359.

But, if upon the facts, as proved, or upon admitted facts, or upon the proper construction of an Act or document, the judge has no jurisdiction, his finding that he has jurisdiction will not prevent prohibition: see *Elston v. Rose*, L.R. 4 Q.B. 4, where the judge had jurisdiction over premises of a certain value and wrongly decided that the value was to be ascertained in a manner not authorized by the statute giving jurisdiction: *per Blackburn, J.*, "He applied a wrong rule of law to the facts": see also *Evans v. Sutton*, 8 P.R. 367, where the judge wrongly construed

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an Act to authorize a judgment without evidence: *R. v. Arkwright*, 12 Q.B. 960; *Re Coe v. Coe*, 21 O.R. 409, where upon the true construction of a statute certain notices must have preceded the inquiry: *Ahrens v. McGilligat*, 23 C.P. 171, where the judge wrongly applied an Act authorizing service upon a foreign railway corporation by serving a station master, to a case in which he had no jurisdiction: *Moore v. Wallace*, 13 P.R. 201, where a judge exceeded his jurisdiction by contravening the provisions of a statute: *R. v. Judge of County Court of Lincolnshire*, 20 Q.B.D. 167, where judge wrongly construed a will as giving a vested interest in funds to defendant and appointed a receiver thereof: *Liverpool Gas Co. v. Everton*, L.R. 6 C.P. 414, where a judge's decision upon a question of mixed law and fact, was reviewed and prohibition granted. "A court of limited jurisdiction cannot give itself jurisdiction by finding any facts": *per Lord Wensleydale*, *Rorke v. Errington*, 7 H.L.C. 617 at p. 632; *Jacomb v. Turner* (1892), 1 Q.B. 47; see *McKenzie v. Ryan*, 6 P.R. 223; *Re Moberly v. Town of Collingwood*, 25 O.R. 625.

And where on a point collateral to the merits of the case, upon the decision of which the limit of its jurisdiction depends, the inferior court has wrongly decided even upon the facts, the decision may be reviewed: *London (Mayor) v. Cox*, L.R. 2 H.L. 282, 283; *Bunbury v. Fuller*, 9 Ex. 111; *Pease v. Chaytor*, 3 B. & S. 620; *Thompson v. Ingham*, 14 Q.B. 710 (where the inferior court wrongly decided that the title to land was not in question); *R. v. Stimpson*, 4 B. & S. 301; *Chew v. Holroyd*, 8 Ex. 249; *Marsden v. Wardle*, 3 E. & B. 695; *Chisholm v. Oakville*, 12 A.R. 225 at p. 230.

The court will look beyond the evidence in the court below and allow additional evidence to be given showing jurisdiction: *Heyworth v. London (Mayor)*, 1 C. & E. 312.

Application—By Whom Made.—The party against whom the plaint has been lodged generally makes the application. Where in a garnishment proceeding the court has no jurisdiction over the primary debtor, either the debtor or the garnishee may apply: *DeHaber v. Portugal (Queen)*, 17 Q.B. 171; *Wadsworth v. Spain (Queen)*, 17 Q.B. 191.

A stranger may make the application: *Articuli Cleri*, 3 Jac. 1, 3rd objection; L.R. 2 H.L. 279; *Baker v. Clark*, L.R. 8 C.P. 121; *Jacobs v. Brett*, L.R. 20 Eq. 1; but the better opinion seems to be that the interference of the court, upon the application of a stranger is discretionary: L.R. 2 H.L. 280; *Re Forster*, 4 B. & S. 187; *Worthington v. Jeffries*, L.R. 10 C.P. 379; *Chambers v. Green*, L.R. 20 Eq. 552; *Ellis v. Fleming*, 1 C.P.D. 237; *Broad v. Perkins*, 20 Q.B.D. 533; *Ede v. Jackson*, Fort. 345.

To Whom Made.—The application is made to a judge of the High Court in *Chambers*: *Johnston v. Galbraith*, 18 C.L.T. 58; *King v. Charing Cross Bank*, 24 Q.B.D. 27; R.S.O. (1877) c. 52, s. 3; R.S.O. (1887) c. 44, s. 36; C.R. 1100; *Watson v. Lillieo*, 6 Man. L.R. 59.

Material in Support of.—The application must be supported by affidavits showing the want of jurisdiction: C.R. 1100; all the materials upon which the court below has acted should be brought before the court: *Re Grass v. Allen*, 26 U.C.R. 123.

The affidavit should be entitled, "In the High Court of Justice." The affidavits should not be entitled in any cause: *Ex parte Evans*, 2 Dowl. N.S. 410; *Siddall v. Gibson*, 17 U.C.R. 98; *Miron v. McCabe*, 4 P.R. 171; see *R. v. Plymouth & Dartmouth Ry. Co.*, 37 W.R. 334; but if the names of the plaintiff and defendant are used as if there were a cause, the names are mere surplusage: *Hargreaves v. Hayes*, 5 E. & B. 272; *Breedon v. Carr*, 9 Jur. 781; and in practice it is usual to style the affidavits, "In the High Court of Justice." In the matter

of a plaint in the Division Court in the, etc., wherein A.B. is plaintiff and C.D. defendant": *Re Burrows*, 18 C.P. 493.

The affidavit must be drawn up in the first person, stating the name of the deponent in full: C.R. 516; and filed with the clerk in Chambers: C.R. 525.

It must state clearly and distinctly the facts which show that the application ought to be granted, and show affirmatively that the court has gone beyond its jurisdiction. So, when a judge has jurisdiction to inquire into the objection it must be shown that it was substantiated: *Per Wilde, C.J., Kempton v. Willey*, 1 L.M. & P., p. 280.

For form of affidavit see Form 345.

When application for the order has been made and refused, a second application may be made on different grounds from those on which the first application was founded.

It is for the party opposing prohibition to show jurisdiction: *R. v. Lord Mayor*, 8 T.L.R. 298; but see *Bongard v. McWhirtier*, 12 U.C.R. 143; *McWhirtier v. Bongard*, 14 U.C.R. 84; *Re Superintendent of Schools v. Sylvester*, 18 U.C.R. 538, where it is laid down that the party applying must make out a clear case.

Notice of Motion.—Unless the court or judge gives special leave to the contrary, notice should be served two clear days before the return day of the motion, and in the computation of such two clear days, Sundays and days on which the offices are closed are not to be included: C.R. 348. The day of service and the return day are both excluded: C.R. 344 (2). No summons, rule, or order to show cause will be granted: C.R. 356. The judge of the inferior court and the parties opposed in interest to the party making the application, should be served with the notice. If the prohibition is to restrain a ministerial act such as the issue of a warrant of execution or commitment, the clerk should be served with notice: *Re Woltz v. Blakely*, 11 P.R. 430; *R. v. Fletcher*, 2 E. & B. 279.

Rules of Court.—The following is the Consolidated Rule referring to prohibition:—

1100.—Prohibition may be granted by judgment or order upon motion to the court or a judge. A writ of prohibition shall not be issued but the judgment or order shall have the same effect as a writ of prohibition formerly had.

Stay of Proceedings.—Proceedings in the court below cannot be stayed by the High Court pending prohibition: *Miron v. McCabe*, 4 P.R. 171. The inferior court might, however, by virtue of its inherent power, stay proceedings.

Restitution.—If execution has been levied and the money made, the prohibiting court will order its repayment: *Re Johnson v. Therrien*, 12 P.R. 442; But *quære*, see 1 H. & L. 654. And where a transcript had been issued to a higher court, the judgment founded thereon was set aside: *Labatt v. Chisholm*, 11 C.L.T. 188; see *Beattie v. Holmes*, 29 O.R. 264.

Declaration in Prohibition.—Where a party made out a *prima facie* case for prohibition, and the party against whom the application was made objected to the granting of the writ, the court might direct the applicant to declare in prohibition: *Worthington v. Jeffries*, L.R. 10 C.P. 379. This was nothing more than an issue directed in a disputed case only, to inform the conscience of the court whether the court below had power to proceed. It could not be resorted to as a matter of course, but only by discretion of the prohibiting court, and then not without the concurrence of the defendant (respondent) who might allow the prohibition to go, in the first instance, without the expense of showing cause: *London (Mayor)*

v. Cox, L.R. 2 H.L. 278; *Pewtress v. Harvey*, 1 B. & Ad. 154; *Mittleberger v. Merritt*, 2 U.C.R. 413.

The practice, in such cases, was prescribed by R.S.O. (1877) c. 52, s. 2. This statute is now repealed: R.S.O. (1887) Sched. A. p. 2660; 51 Vic. c. 2, s. 2. All former practice inconsistent with the Consolidated Rules is also repealed: C.R. 2, 3.

As the rules now provide for an appeal, there is less necessity for such a proceeding: *Mackonochie v. Lord Penance*, 6 App. Cas. 424 at p. 444, and it was unusual: see *Toomer v. London, C. & D. Ry. Co.* 2 Ex. D. at p. 458; *Serjeant v. Dale*, 2 Q.B.D. at p. 568.

In a proper case, the court might direct an issue to ascertain the actual facts.

Appeal.—Formerly there was no appeal, but the party applying for prohibition could move for prohibition in one court and if refused could renew the application in another court and so go from court to court as in the case of other prerogative writs. Now, however, by the Judicature Act, a right of Appeal from every order or judgment of the High Court is given, and an appeal lies from the decision of a Divisional Court granting or refusing to grant prohibition: *The Receipts*, (1893) P. at p. 261; *Barton v. Titmarsh*, 49 L.J. Q.B. 573; (1893) P. 255; *Lister v. Wood*, 23 Q.B.D. 229; *Watson v. Petts*, (1899) 1 Q.B. 54.

An appeal may also be made to the Supreme Court of Canada: 54-55 V. c. 25, s. 2 (D).

Notice of appeal must be served on County judge; *Gibbons v. Chadwick*, 12 C.L.T. 328.

Costs.—The costs are in the discretion of the court or judge: C.R. 1130. A successful party is entitled to and should be awarded costs, unless the court, in the proper exercise of a wise discretion, can see good cause for depriving such party of them, and such party should not be deprived of costs, unless there appear impropriety of conduct which induced the litigation, or impropriety in the conduct of the litigation: *McLeod v. Emigh*, 12 P.R. 503; *Re Brazill v. Johns*, 24 O.R. 209; see *Wallace v. Allen*, L.R. 10 C.P. 607; *Ex parte Overseers of Everton*, L.R. 6 C.P. 245; "It is difficult to understand on what principle a litigant who successfully impeaches the jurisdiction of the court into which his adversary has improperly dragged him, is to be deprived of the costs of the proceeding which the conduct of his adversary has rendered comparatively necessary: *R. v. London (Justices)*, (1894) 1 Q.B. 453."

Where a defendant moved for prohibition, on the ground of want of territorial jurisdiction, before the hearing, and pending the motion, the inferior court transferred the plaint to the proper court, it was held that the defendant was entitled to the costs of the motion: *Olmstead v. Errington*, 11 P.R. 366. Where the opposite party was not in fault, costs were refused: *Re Hawley v. Young*, 7 C.L.T. 346. It is not usual to give costs against the judge: *Re Johnston v. Therrien*, 12 P.R. 442. Where there were not merits but the plaintiff persisted in proceeding, costs were allowed: *Rutherford v. Walls*, 12 C.L.T. 205; see *Nerlick v. Clifford*, 6 P.R. 212; *Mitchell v. Scribner*, 20 O.R. 17; *Field v. Rice*, 20 O.R. 309.

A party in whose favor judgment is given is entitled to costs of the application: *Ex parte Tucker*, 4 M. & W. 1079.

In several cases the costs of action not arising within the jurisdiction of the court were ordered to be paid by the respective attorneys for the plaintiffs: *Mem.* 30 L.T. 50. But a solicitor will not be ordered to pay the costs unless the rule has been moved for in that form and he has had an opportunity of showing cause: *Rogers v. London, C. & D. Ry. Co.*, 26 W.R. 192.

Effect of Dismissal of Application.—The dismissal of the application for prohibition before trial is conclusive as to the question of jurisdiction, and the judge at the trial should not receive evidence from the defendant upon that question: *Symons v. Rees*, 1 Ex. D. 416.

Damages.—After obtaining the order of prohibition, an action would seem to lie for the damages sustained by reason of the plaintiff being prosecuted in a court having no jurisdiction: *Buller's N.P.* 219; *Cro. Cas.* 550; *Mittlebenger v. Merritt*, 2 U.C.R. 413.

The costs incurred by a plaintiff in prohibition in his defence to the suit in the inferior court are not recoverable as damages: *White v. Steel*, 13 C.B.N.S. 231.

Mandamus.—Mandamus is a writ issuable out of the High Court of Justice requiring the inferior court or the judge or the officer thereof to do some particular thing which pertains to their office or duty. "It issues in all cases where the party hath a right to have anything done and hath no other specific means of compelling its performance." *Shortt on Informations*, 223. Two circumstances must concur: a specific legal right: *R. v. Levisham Union*, (1897) 1 Q.B. 498; see *Re Whitaker and Mason*, 18 O. R. 63; *Peebles v. Oswaldtwistle* (1897), Q.B. 625; and the absence of an effectual remedy: *R. v. Joint Stock Companies' Registrar*, 21 Q.B.D. 131; *R. v. St. Giles, Camberwell, Vestry*, 45 W.R. 335; if the remedy is doubtful mandamus will issue: *R. v. Nottingham Old Waterworks Co.*, 67 A. & E. 355; *R. v. Bristol Dock Co.*, 12 East 429; *R. v. Nottingham Water Co.*, 6 A. & E. 355; *R. v. Garland*, L.R. 5 Q.B. 269.

There must be a demand and refusal: *Re Peck* and the Cor. of Peterborough, 34 U.C.R. 129; *Re Irving v. Askew*, 20 L.T. 584; *R. v. Pontypool*, C.C. Judge, 71 L.T. 17; and if the officer is entitled to a fee it must be paid or tendered with the request: *Re The Clerk of Euprasia (Tp.)*, 12 U.C.R. 622; section 58; *Rules* 297, 298; *Parke v. Clarke*, 14 C.L.T. 32.

If there is any other remedy, *e.g.*, application to the judge or appeal, it will not be granted; *Re Marter and The Cor. of Gravenhurst*, 18 O.R. 243; *Re Charity Comrs. of England and Wales*, (1897) 1 Q.B. 407. Where the application was resisted on the ground that another remedy was provided, but the court was of opinion that it was not an equally beneficial remedy, mandamus was granted: *R. v. Leicester*, (1899) 2 Q.B. 632. It will not be granted when the applicant himself is in fault: *R. v. Wigan*, 1 App. Cas. 622; *R. v. The G. W. Ry. Co.*, 69 L.T. 592.

The prerogative writ is not obtained by action but only by motion: *Kingston v. Kingston P. & C. Electric Ry. Co.*, 28 O.R. 399; 25 A.R. 462; *Smith v. Chorly District Council*, (1897) 1 Q.B. 532.

The application must be made in proper time. It must not be delayed too long, neither, on the other hand, must it be made prematurely: *Shortt*, 227, 250, 251; *Re McCallum and School Trustees of Brant*, 17 O.R. 451; *Cook v. Jones*, 9 W.R. 618.

When a judge, having heard the evidence, decides he has no jurisdiction, a mandamus will not be granted to compel him to hear it: 2 U.C.L.J. 178; *Ex parte Milner*, 15 Jur. 10, 37; but see *R. v. Southampton C.C.*, 65 L.T. 320, in which it was held that where the right is clear, mandamus must issue, although the judge or officer acted under a mistake of law or a misapprehension of his duty in refusing to perform the act: see also *Holboron v. Jones*, L.R. 4 C.P. 14, per *Smith, J.*; *Hebling v. Duggan*, 1 C.L.T. 108; *Re Emery and Barnett*, 4 C.B.N.S. 423; *R. v. St. Pancras*, 28 Q.B.D. 371; *R. v. Cotham*, (1898) 1 Q.B. 802. The writ will only be granted when the jurisdiction of the inferior court is clear: *Trainor v. Holcombe*, 7 U.C.R. 548; *Pearson v. Glazebrook*, L.R. 3 Ex. 27; *Re Jackson v. Clark*, 36 C.L.J. 68. It will not be

granted to compel a judge to alter an adjudication upon a matter within his jurisdiction, nor to compel the clerk to act in disregard of the adjudication of the judge: *Burns v. Rutherford*, 12 U.C.R. 140; *Coolican v. Hunter*, 7 P.R. 237; nor to reverse his decision on a point of practice: *Gerow v. Hoyle*, 28 O.R. 405; *Re Woods v. Renneth*, 12 U.C.R. 167; *Re Judge of Elgin*, 9 U.C.L.J. 238; nor to prescribe what evidence should be received or rejected: *R. v. Connolly*, 22 Q.B. 220. But the judge cannot set up a general rule of practice contrary to the rules of court: *R. v. Judge of Marylebone*, C.C. 34 Sol. J. 459; *Re Oliver v. Fryer*, 7 P.R. 325. It will not be granted to compel a judge to approve of security tendered on appeal or to certify the proceedings after the proper time: *Ford v. Crabb*, 8 U.C.R. 274; *Orr v. Barrett*, 9 C.L.T. 72; 6 Man. L.R. 300; nor on a mere matter of practice, as where a clerk improperly issued a summons with a blank for the name of a party: *Re Gerow v. Hoyle*, 28 O.R. 405.

Mandamus will issue to compel a judge to try a case before him: *Re Burns v. Butterfield*, 12 U.C.R. 140; unless he is interested: *Re The Judge of Elgin*, 20 U.C.R. 588.

Where the judge wrongly decides a preliminary question and refuses to go into the merits, as in interpleader issues which he refused to hear on the erroneous ground that the particulars of claim were insufficient, mandamus was granted: *R. v. Richards*, 2 L.M. & P. 351; *Churchward v. Coleman*, L.R. 2 Q.B. 18. See also *R. v. Judge of Southampton*, C.C. 65 L.T. 320.

And where before 62 Vic. c. 11, s. 9, the judge entered a non-suit instead of submitting to the jury the issue whether a former adjudication by him (the judge) determined the matter in dispute a mandamus was granted: *Re Cowan v. Affie*, 24 O.R. 358. A mandamus will issue to compel the judge to try a case in which the jurisdiction is disputed, but which the court held to be within his jurisdiction: *Re Sawyer-Massie Co. v. Parkin*, 28 O.R. 662; see *Brighton Sewers' Act*, 9 Q.B.D. 723; *Vernott v. Bailey*, 4 W.R. 608.

A clerk may be compelled to issue an execution: *R. v. Fletcher*, 2 E. & B. 279; *Re Linden v. Buchanan*, 29 U.C.R. 1; see *Re Massey Mfg. Co.*, 11 O.R. at p. 463; *Re Oliver v. Fryer*, 7 P.R. 325; *R. v. Surrey*, C.C., 21 L.J.Q.B. 310; but his fees should first be tendered him: *Parke v. Clark*, 14 C.L.T. 32.

A judge cannot be compelled to exercise his discretion in a particular way: *Re White v. Galbraith*, 12 P.R. 513; *Re Jackson v. Clark*, 36 C.L.J. 68; see *Re McCallum v. School Trustees of Brant*, 17 O.R. 451; *Giles v. Village of Wellington*, 30 O.R. 610; nor will the court interfere with a matter within his discretion if he has really exercised it; *Clifton v. Furley*, 7 H. & N. 783; *Smith v. Chorley District Council*, (1897) 1 Q.B. 532, 678; and if he enters upon the hearing of a case and decides it, however erroneously, the order will not be granted: *Per Coleridge, J.*, *R. v. Richards*, 20 L.J.Q.B. 352; and *per Earl, J.*, *Ex parte Milner*, 15 Jur. 1037. The remedy in such cases is by appeal or prohibition. See *R. v. Worcestershire (Justices)* 3 E. & B. 477; *Sturgis v. Joy*, 2 E. & B. 739, 740; *Re Corbett*, 4 H. & N. 452; and where a plaintiff elected to take a nonsuit, on the judge refusing to hear his witnesses, it was held that as long as the nonsuit stood the judge could not be compelled to act: *Fortesque v. Paton*, 3 L.T. 268; and so, when a judge discharged the jury and directed a nonsuit to be entered, it was held that mandamus was not the remedy: *Kerehard v. Chantler*, 26 L.T. 474. Where the judge refused to commit a defendant for non-production of books under a subpoena *duces tecum*, and pursuant to notice, on his examination as a judgment debtor under section 243, on the ground that there was no express provision authorizing a committal in such a case, and the liberty of the subject being

involved, he thought it wiser to take that course, the court refused to interfere: *Re Jackson v. Clark*, 36 C.L.J. 68.

The remedy of mandamus cannot be extended to cases to which it does not extend by law, even by waiver of the parties: *Per Lord Campbell, C.J., R. v. Lords of the Treasury*, 16 Q.B. 357, 359.

Application for.—The application for mandamus should be upon notice to the judge or officer and to the opposite party returnable not less than two clear days after service. It should be made to a Judge in Chambers, C.R. 1091-1093.

If an application is made to a judge in court, costs only of chamber's application will be allowed: *Re Brookfield and Trustees of Brooke*, 12 P.R. 485. The motion should be supported by affidavits.

All proceedings should be entitled, "In the High Court of Justice," In the matter of a certain plaint in the Division Court of the County of _____, wherein A.B. is plaintiff and C.D. is defendant.

The judge is entitled to appear upon the application: *R. v. Cooper*, 24 Q.B.D. 60.

The application should be made in a reasonable time. A delay of twelve months was held to bar the right to mandamus: *Coke v. Jones*, 4 L.T. 306.

The want of the affidavit on the application was held, under the English Rules, to be an irregularity only; and that the judge who failed to attend on the argument could not object to the irregularity after the order had been served: *Ex parte Furber*, 3 H. & N. 521.

EXCEPTIONS FROM JURISDICTION.

Gambling Debt.—See rule 233. The question of what is a gambling debt, within the meaning of this section, is not discussed in any reported case. In *Summerfeldt v. Worts*, 12 O.R. 48, a sum due on a cheque given for losses in matching coppers, was held to be clearly a gambling debt.

It is submitted that a gambling debt is "any sum due as a result of a wager, or bet, or game of chance or skill." A wager or bet is defined as a contract entered into without color of fraud between two or more persons for a good consideration and upon mutual promise to pay a stipulated sum of money, or to deliver some other thing, to each other, according as some proposed and equally uncertain contingency should happen, within the terms upon which the contract was made: 2 Chitt. Stats. 3rd ed. *Gaming*, p. 276, note b; *Bank of Toronto v. McDougall*, 28 C.P. 345; *Carlill v. Carbolic Smoke Ball Co.*, (1892) 2 Q.B. 484.

In an action against the maker of a note for value, payable to bearer, and transferred to the plaintiff for value after it was due, it was held no defence to the plaintiff's transferor, that he received it in payment of a gambling debt: *R. & J. 533*; *Burr v. Marsh*, M.T. 4 Vic.

According to the Common Law of England, altered by 8 and 9 V. c. 109 (not in force in this province), an action might be maintained on a wager, although the parties had no previous interest in the question on which it was laid, if it was not against the interest or feelings of third persons, and did not lead to indecent evidence, and was not contrary to public policy: *Thackoorseydass v. Dhoudmull*, 6 Moo. P.C. 300.

No action can be maintained by A. against B. on a wager in which A. bets that B. will, and B. that he will not pass his examination as an attorney, inasmuch as B. has the power of determining the wager in his own favor: *Fisher v. Waltham*, 4 Q.B. 889.

An agreement in the nature of a bargain, but which is in reality a bet, is invalid: *Rourke v. Short*, 5 E. & B. 904.

The employment of an agent to make a bet in his own name, on behalf of his principal, implies an authority to pay the bet if lost, and on the making of the bet that authority becomes irrevocable: *Read v. Anderson*, 10 Q.B.D. 100; 13 Q.B.D. 779; *Bridger v. Savage*, 15 Q.B.D. 363; *Bubb v. Yelverton*, *Re Ker*, 24 L.T. 822; *Knight v. Lee*, (1893) 1 Q.B. 41.

Money paid in discharge of a lost bet made for another, is recoverable from such other person: *Oldham v. Ramsden*, 32 L.T. 825.

Money lent to enable the borrower to pay a bet, which he had already lost, would not, it is submitted, constitute a gambling debt within the meaning of this section, and would consequently be recoverable by the lender: *Ex parte Pyke*, *Re Lister*, 8 Ch. D. 754.

But money lent for the purpose of playing an illegal game would not be recoverable: *McKinnell v. Robinson*, 3 M. & W. 434; *Carney v. Plummer*, (1897) 1 Q.B. 634.

Money lent by a licensed innkeeper for the purpose of enabling a guest to play an unlawful game, contrary to his license, would not be recoverable back: *Foot v. Baker*, 5 M. & G. 335.

As to money lent for gambling purposes, but not so used by borrower: see *Tyler v. Carlisle*, 1 Amer. St. R. 301 (U.S.).

A bet between individuals as to the result of a parliamentary election is illegal: *Trebelcock v. Walsh*, 21 A.R. 550.

A stake-holder who receives bank notes as money, and pays them over originally to the original stake-holder after he has lost the wager, is answerable to the winner for money had and received to his use: *Pickard v. Banks*, 13 East 20. But if he pays over the money to the party who has won, he is not liable to repay it to any person whomsoever: *Brandon v. Hibbert*, 4 Camp. 37; *Brown v. Overbury*, 11 Ex. 715.

Where A. and B. deposit money in the hands of a stake-holder to abide the event of a boxing match, and when the bettor A. claims the whole sum from the stake-holder and threatens him with an action if he pays it over to B., which he nevertheless does by direction of the umpire, A. is entitled to recover from him his own stakes as money had and received to his own use, on the ground of its being an illegal wager: *Hastelow v. Jackson*, 8 B. & C. 221. It would be otherwise if no notice was given: *Id.* To the same effect is *Diggle v. Higgs*, 2 Ex. D. 422; *Trimble v. Hill*, 5 App. Cas. 342; *Hampden v. Walsh*, Q.B.D. 189. See also *Logue v. McCuish*, 21 N.S. Reps. 75.

The following American cases are referred to on the subject of gambling:

"Gambling" includes playing billiards for beer, oyster, or cigars: *State v. Bishel*, 39 Iowa 42; *Hausberg v. People*, 35 Alb. L.J. 98.

A horse-race is a gambling device: *Joseph v. Miller*, 2 New Mexico 621.

The court said: "The word 'gambling' is one of very general application, and is not restricted to wagering upon the result of any particular 'game or games of chance.' In the adjudicated cases on this subject we find that judges often have applied this word indiscriminately to wagering of all kinds. We are unable to discover any distinction in general principle between the various methods that may be adopted for determining by chance who is the winner and who the loser of a bet—whether it be by throwing dice, flipping a copper, turning a card, or running a race. In either case it is gambling. This is the popular understanding of the term 'gambling device,' and does not include any scheme, plan or contrivance for determining by chance which of the parties has won and which has lost a valuable stake. That a horse-race, when adopted

for such a purpose, is a 'gambling device' there can be no doubt: See *Shropshire v. Glascock and Garner*, 4 Mo. 536, and cases there referred to."

"The word 'gaming' has been held to extend to physical contests whether of man or beast, when practised for the purpose of deciding wagers, or for the purpose of diversion, as well as to games of hazard or skill, by means of instruments or devices:" *Boughner v. Meyer*, 5 Colo. 71.

Spirituos or Malt Liquors.—The jurisdiction of the Division Court is not excluded in an action for spirituuous or malt liquors alone. Their price may be recovered by a person having the right to sell them if they are "*not drunk in a tavern or alehouse*." Whether they have been so or not is a question for the judge or jury to determine before proceeding with any other question in the case. If after hearing all the evidence adduced on that point, and it be decided that the liquors were not drunk in a tavern or alehouse, and the plaintiff otherwise had the right to sell the same, and the judge determines that the court had jurisdiction, the cause could not be prohibited. Another court could not determine on an application for prohibition as to the correctness of his finding on the question of fact. It must be borne in mind that the right to sell such liquors in this province is regulated by the Liquor License Act of Ontario (R.S.O. c. 245). If a person had not the right to sell such liquors under a license therefor, he could not recover for the price of same: *Sinclair's License Act* p. 285.

The question whether liquors are "spirituous" or "malt" must be determined as any other question of fact: *Harris v. Jenns*, 9 C.B.N.S. 152.

"Spirituous" means containing, partaking of spirit; having the refined, strong, ardent quality of alcohol in greater or less degree. Hence, "spirituous liquors" imply such liquors as contain alcohol and thus have spirit, no matter by what particular name denominated, or in what liquid form or combination they appear. Hence, also, distilled liquor, fermented liquor, vinous liquor, are all alike spirituous liquors. Lager beer and wine contain alcohol and generally in such quantities and degree as to produce intoxication. These liquors are therefore spirituous: *State v. Giersch*, 37 Alb. L.J. 201. This was in North Carolina. In West Virginia, however, a different view of the matter is taken and it is held there that the term does not include wine or other fermented liquor, for the words imply that the beverage is composed in part or fully of alcohol extracted by distillation: *State v. Oliver*, 26 W. Va. 422; S.C. 53 Am. Reps. 79.

Although "Cronk" was sworn to be a kind of beer, the court would not take judicial notice that it was intoxicating or spirituous: *R. v. Beard*, 13 O.R. 608.

Liquor containing from 2 to 3 per cent. of alcohol is intoxicating within the Liquor License Act: *R. v. Wotten*, 33 C.L.J. 746; *R. v. McLean*, 35 C.L.J. 241.

If there are several items in the bill, and the illegal ones are separable from the others, the legal ones are recoverable: *Gilpin v. Rendle*, 1 Selwyn's N.P. 61.

Where money is paid generally on account, without any specific appropriation at the time of payment, and part of the account is illegal (being a demand for liquor sold) and part legal, it is said the creditor would have the right to apply the money on the demand for liquor sold: *Philpott v. Jones*, 2 A. & E. 41; *Cruickshank v. Rose*, 5 C. & P. 19; *Simpson v. Ingham*, 2 B. & C. p. 72; *Hooper v. Keay*, 1 Q.B.D. 178; *Kinnaird v. Webster*, 10 Ch. D. 139.

Cross demands may be settled, even though there is a claim for liquor in one of them, and not recoverable for. It is only the right to recover which the statute bars, not the right to pay for them: *Dawson v. Remnant*, 6 Esp. 24.

Tavern or Alehouse.—It is submitted that these words mean licensed places. No debt could be created for sale of liquors drunk anywhere without there being a license to sell: *Ritchie v. Smith*, 6 C.B. 462. In an action for the recovery of the price of liquor sold to a hotelkeeper, it was held that the words "liquor drunk in a tavern or alehouse," meant in a tavern or alehouse of the vendor: *Re McGolrick v. Ryall*, 26 O.R. 435.

A tavern is defined to be "A house licensed to sell liquors to be drunk on the spot, with accommodation and entertainment for travellers": *Nuttall's Standard Directory*. Worcester's definition is: "A public house where wine and liquors are sold and entertainment for a party are provided." An "alehouse" is a place where excisable liquors are sold by retail to be drunk on the premises. The word is probably synonymous with "public house" and "tavern" which latter words were employed in *London and Suburban Land Co. v. Field*, 16 Ch. D. 645; *Holt v. Collyer*, 16 Ch. D. 718; *Stroud*, 27.

Additions to licensed premises do not destroy their character, the question is, are they substantially the same: *R. v. Raffles*, 1 Q.B.D. 297; *R. v. Smith*, 15 L.T. 178; *Stringer v. Huddersfield*, 33 L.T. 568.

It must always be kept in view that in order to oust the jurisdiction of the court, the liquors sued for must be *drunk* in one or the other of the places mentioned in this section. See Rule 233.

A person licensed to sell beer, "to be drunk or consumed off the premises," who supplied a pint of beer to a traveller who sat upon a bench placed and fastened against the wall of the house, returning the mug in which he was served, was held to have been properly convicted of selling beer to be drunk on the premises: *Cross v. Watts*, 13 C.B.N.S. 239. See also *Bath v. White*, 3 C.P.D. 175; *Bridgen v. Heighes*, 1 Q.B.D. 330; *R. v. Palmer*, 46 U.C.R. 262.

But ale handed through a window to a customer who called for it and drank part of it whilst standing on the highway, was held not to have been sold "to be consumed on the premises," through he drank the remainder whilst sitting on the window sill of the house: *Deal v. Schofield*, L.R. 3 Q.B. 8.

Illegal Promissory Notes.—"Notes of hand," by which is meant promissory notes, cheques, orders for the payment of money, due bills, I.O.U.'s, and "all evidences of debt under the hand of the debtor," given for any of the prohibited matters or things are not within the jurisdiction of the Division Court: *In re Summerfelt v. Worts*, 12 O.R. 48; Rule 233.

The "note of hand" is not suable in the Division Court, even though in the hands of an innocent holder: *In re Summerfelt v. Worts*, 12 O.R. 48; *Harper v. Young*, 34 Alb. L.J. 376; 37 Alb. L.J. 181. But in another court it would possibly be: *Bowen v. Webber*, 34 Alb. L.J. 76; *The Canadian Bank of Commerce v. Gourley*, 30 C.P. 583.

If a note should in form be given for a loan of money, but in reality for one of the prohibited considerations, it would be within this section: *Hill v. Fox*, 4 H. & N. 359.

See Rule 223 and notes to sub-section 1 of this section.

Actions for the Recovery of Land.—The language of this sub-section has been somewhat changed to make it more consistent with the Ontario Judicature Act. Under the former Act the words were "Actions of

Ejectionment." The meaning is substantially the same, and wherever jurisdiction was formerly excluded as virtually being an action of ejectionment, so also is jurisdiction excluded under this sub-section.

When Jurisdiction Ousted.—The title of a corporeal hereditament is in question whether its existence or the right of the claimant to it is denied: *Adey v. Deputy-Master of Trinity House*, 22 L.J. Q.B. 3; S.C., 1 E. & B. 273, *sub nom.* *R. v. Everett*; *Re Moberly v. Collingwood*, 25 O.R. 625. There must be some show of reason for the claim: *Cornwell v. Sanders*, 3 B. & S. 206. The claim must be a *bona fide* one and the right one that can exist in point of law: *Hudson v. McKae*, 4 B. & S. 585; *Lloyd v. Jones*, 6 C.B. 81; *Hargreaves v. Diddams*, L.R. 10 Q.B. 582; *Reece v. Miller*, 8 Q.B.D. 626. The facts or the evidence must show that title is *bona fide* in dispute: *Howorth v. Sutcliffe* (1895), 2 Q.B. 358; *Lilley v. Harvey*, 5 D. & L. 648; *Emery v. Barnett*, 4 C.B.N.S. 423; and the claim must be of such a nature as, if substantiated would form a defence to the action: *Leath v. Vine*, 30 L.J.M.C. 107. If there are disputed facts, or a question as to the proper inference from undisputed facts there is no jurisdiction: *Re Moberly and Collingwood*, 25 O.R. 625. The court will have no jurisdiction if there is a real dispute, although the claim may be founded on the most utter bad faith, and the evidence supporting it is insufficient: *Marsh v. Dewes*, 17 Jur. 558. In that case the defence set up title upon a ground involving the question of legitimacy, and produced very slight and inconclusive evidence in support of it, while in *Lilley v. Harvey*, 5 D. & L. 648, *supra*, no evidence whatever was produced in support of the defendants' contention, which was evidently set up merely to avoid the jurisdiction. Where in an action of tort for personal chattels the title to land comes incidentally in question, the jurisdiction is ousted: *Trainor v. Holcombe*, 7 U.C.R. 548. Where the question was whether certain goods were part of the freehold or not, the jurisdiction was held to be ousted: *Portman v. Patterson*, 21 U.C.R. 237. But in a later case it was held to be a question of fact, and if the judge decided that the chattel was not part of the freehold, the jurisdiction was not ousted: *Re Emsell v. Moss*, 11 P.R. 251. The earlier case of *Portman v. Patterson* was not cited: see *McNeill v. Haines*, 13 P.R. 115; *Macara v. Dines*, 2 West, L.T. 99; *Muskoka Mill and Lumber Co. v. McDermott*, 21 A.R. 129.

Where a defendant claimed the right to obstruct a street it was held that title was brought in question: *R. v. Taylor*, 8 U.C.R. 257; so also where a right of way was claimed across a railway: *Cole v. Miles*, W.N. (1888) 150.

Rent issuing out of land involves the question of title to land, and where if the parties had been landlord or tenant the court would have had jurisdiction, but the defendant claimed to be a freeholder, the jurisdiction was ousted: *Pearson v. Glazebrook*, L.R. 3 Ex. 27; but when in an action for double rent the tenant was estopped from denying his landlord's title, his claim of title was no avail: *Wickham v. Lee*, 12 Q.B. 521; *Bank of Montreal v. Gilchrist*, 6 A.R. 659; but it would have been otherwise if it had been shown that the lessor's title had expired during the tenancy: *Mountnoy v. Collier*, 1 E. & B. 630. Where in an action for rent the defence set up that the rent belonged to a third party to whom it had been paid, the jurisdiction was ousted: *Fair v. McCrow*, 31 U.C.R. 599; but see *Re Moberly v. Collingwood*, 25 O.R. 625; *Re Whiting v. Sharples*, 9 C.L.T. 141; *Re English v. Mulholland*, 12 C.L.T. 89. And in an action for the recovery of the arrears of a rent charge issuing out of land it was held that it was not the title to the land but the title to the rent charge which was in question: *Bassano v. Bradley*, (1896) 1 Q.B. 645. Where a demise is admitted but the question whether certain rooms were included in the demise is disputed, the jurisdiction is ousted: *Chew v. Holroyd*, 8 Ex. 249; followed in *Armstrong v. McGourty*, 22 N.B.R. 29, in which it was held that a question as to the duration of the tenancy ousted the jurisdiction.

If a party is charged with liability by reason of ownership of certain land and he denies that ownership, title is in dispute: *R. v. Harden*, 2 E. & B. 187; see *Re Knight v. Medora* (Tp.), 14 A.R. 112; *Re South Norfolk v. Warren* 12 C.L.T. 512. In an action for interference with the flow of water through a pipe, if the defendant refuses to admit the plaintiff's title to the easement, the court has no jurisdiction. *Howorth v. Sutcliffe*, (1895) 2 Q.B. 358.

Though the fact that the title comes in question does not appear on the face of the proceedings, prohibition may be granted: *Marsden v. Wardell*, 3 E. & B. 695. Application may be made before trial in the inferior court, and prohibition will be awarded if it appear that title must come in question: *Macara v. Morrish*, 11 C.P. 75; *Sewell v. Jones*, 15 Jur. 153.

For other cases where jurisdiction ousted see *R. v. Davidson*, 45 U.C.R. 91; *R. v. McDonald*, 12 O.R. 381. In these cases a mere *bona fide* claim of right was sufficient, but in Division Courts title must come in question. See also *Symons v. Rees*, 1 Ex. D. 416; *Stolworthy v. Powell*, 54 L.T. 795.

Married Women.—Where it is necessary to prove that a married woman has separate estate, and no evidence can be given of the possession of any personal property in respect of which she may be deemed to have contracted, and a *bona fide* question arises as to whether she has title to certain lands, it seems that the jurisdiction is ousted: *Re Widmeyer v. McMahon*, 32 C.P. 194, in which, however, the title of the married woman was not disputed or brought in question.

When Not Ousted.—The mere claim by a solicitor of right is not sufficient. Title must be in question: *Re Emery v. Barnett*, 4 C.B.N.S. 423; *Lilley v. Harvey*, 5 D. & L. 648; *R. v. Sandford*, 30 L.T. 601; *Ball v. the G. T. Ry. Co.*, 16 C.P. 552. See *Seabrook v. Young*, 14 A.R. 97; *Eversfield v. Newman*, 4 C.B.N.S. 418; *Richardson v. Jenkin*, 10 P.R. 292; *Hebling v. Duggan*, 1 C.L.T. 108.

If there are disputed facts or a question as to the proper inference from undisputed facts, there is no jurisdiction. If the facts can lead to only one conclusion, and that against the defendant, then there is no such *bona fide* dispute as will oust the jurisdiction: *Re Moberly v. Collingwood*, 25 O.R. 625.

The word "land" means the incorporeal hereditament vested in the owner, not the reddendum to be made by the payer: *Dean of Ely v. Bliss*, 2 D.M. & G. 459; *Irish Land Commission v. Grant*, 10 App. Cas. 25. Where a lessor has certain rights under a lease and sells, the mere proof by the vendee in an action against the lessor of his paper title does not oust the jurisdiction: see *Neads v. McMillan*, 29 U.C.R. 415; *R. v. Priest*, W.N. (1887) 65. Where the question was whether certain rails forming a line fence put by mistake on another's land were the property of the party putting them there, title to land was not in question: *Re Bradshaw v. Duffy*, 4 P.R. 50. The terms of a tenancy do not form matter of title: *Re English v. Mulholland*, 9 P.R. 145; *Re Knight*, 1 Ex. 802; nor the question whether the right to impound is implied from a right to pasturage: *Graham v. Spettigue*, 12 A.R. 261; nor is the question whether a municipality is bound to repair a road: *Knight v. Medora* (Tp.) 11 O.R. 138; 14 A.R. 112; nor whether a stream is navigable: *Reece v. Miller*, 8 Q.B.D. 626. The plea of "not guilty by statute" in an action against a road company for obstructing the flow of water does not bring title to land in question: *Overholt v. Paris and Dundas Road Co.*, 7 C.P. 296. In an action for false imprisonment, no question of title can arise: *Eversfield v. Newman*, 4 C.B.N.S. 418; nor in an action for the recovery of arrears of taxes, unless the defendant cannot be held liable without trying the question of title: *Re South Norfolk v. Warren*, 12 C.L.T. 512; see *Baddeley v. Denton*, 4 Ex. 508; *Gwynne v. Knight*, 1 Ex. 802.

Procedure.—It is the duty of the judge to inquire and decide whether title is really in dispute, but his decision is not final: *Thompson v. Ingham*, 14 Q.B.D. 710; *Re Emery v. Barnett*, 4 C.B.N.S. 423; and the evidence must be such as would be proper to submit to a jury: *Re Huntsworth*, 33 L.J.M.C. 131. But where he has decided upon conflicting evidence the Superior Court will not interfere except upon very strong grounds: *Re Long Point Co. v. Anderson*, 18 A.R. 408; *Re Bowen*, 21 L.J.Q.B. 10; *Brown v. Cocking*, L.R. 3 Q.B. 672; *Enraght v. Lord Penzance*, 7 App. Cas. 240; *Macara v. Dines*, 2 West L.T. 99.

The rule laid down in *Re Bushell v. Moss*, 11 P.R. 251, seems wider than that of the other cases. If the claim for title is ignored, the judge should state clearly his grounds for so doing: *Birnie v. Marshall*, 35 L.T. 373. The action simply stops for want of jurisdiction. A nonsuit cannot be entered: *Lawford v. Partridge*, 1 H. & N. 621. But the action should not be dismissed but may be removed by writ of *certiorari* to a High Court upon such terms as the judge thinks fit: section 81.

Care must be taken to distinguish cases in which the right to Superior Court costs was upheld, upon the ground that title was in question, from cases where the question is, Has an inferior court jurisdiction? The right to Superior Court costs depends upon the pleadings and not upon what takes place at the trial. The pleas of *non demisit* or not possessed, have been held in Ontario, to raise the question of title: *Purser v. Bradburne*, 7 P.R. 18; *Coulson v. O'Connell*, 29 C.P. 341; but see *Talbot v. Poole*, 15 P.R. 99. A mere general denial of the allegations in the statement of claim may raise a question of title sufficient to entitle the plaintiff to Superior Court costs: *Worman v. Brady*, 12 P.R. 618; *Danaher v. Little*, 13 P.R. 363; *Flett v. Way*, 14 P.R. 312. When the question, however, is, Has an inferior court jurisdiction? it is material to enquire what took place, or must necessarily take place, at the trial. The court has to be satisfied that title really comes in question before prohibition will be granted; *Re Crawford v. Seney*, 17 O.R. 74; *Latham v. Spedding*, 17 Q.B. 444; *Morton v. Grand Junction Canal Co.*, 6 W.R. 543.

Exceptions.—In the following matters Division Courts have jurisdiction, though the title to land is in question: (a) Actions for damage to land by overflowing the same for the purpose of driving logs, timber, or a sawmill, where the sum claimed does not exceed \$20: R.S.O. c. 85, s. 13. (b) Interpleader proceedings: *e.g.*, growing crops seized may be claimed by a mortgagee as part of the land, or rent due for the premises may be claimed by adverse parties; and though, for that purpose, it is necessary to examine the title to land, the jurisdiction will not be ousted. It is a collateral question arising in a matter collateral to the action: *Munzie v. McKinley*, 15 C.P. 50.

Hereditament.—"The settled sense of that word is to denote such things as may be the subject matter of inheritance but not the inheritance itself": *Moore v. Denn*, 2 B. & P. 247.

"Corporeal hereditament" includes land, and the Division Court has no jurisdiction, though the title to a leasehold only may be in question: *Tomkins v. Jones*, 22 Q.B.D. 599; *Chew v. Holroyd*, 8 Ex. 249.

An "incorporeal hereditament" is a right issuing out of a thing corporate (whether real or personal); or concerning or annexed to, or exercisable within the same. It is not the thing corporate itself, which may consist of lands, houses, jewels or the like; but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels: *Kerr's Blackstone* 16; *Re Christmas*, 33 Ch.D. 332. Rents, rights of way and aqueduct, rights to light, rights to customary fees, etc., are instances of incorporeal hereditaments: *Stephenson v. Raine*, 2 E. & B. 744; *Howorth v. Sutcliffe*, (1895) 2 O.B. 358. There must be a dominant and a servient tenement. The right to ground

a barge on a navigable river is not a claim to an incorporeal hereditament: *Hawkins v. Rutter*, (1892) 1 Q.B. 668. Should there be a *bona fide* dispute as to whether a term had been surrendered so as to make rent non-existent, the jurisdiction would be ousted: *Re Moberly v. Collingwood*, 25 O.R. 625.

Toll.—A toll is defined to be a tax paid for any liberty or privilege:—It is the title to the toll that must come in question to oust the jurisdiction: *Hunt v. The Great Northern Ry. Co.*, 10 C.B. 904, *per Jervis, C.J.*, and *Williams, J.* The charges of the railway company for conveyance of goods are not within this part of the section; *Id.* Harbor rates are tolls: *R. v. Everett*, 1 E. & B. 273; but payments to a railway company for use of locomotive power, as distinguished from the use of their railway, are not: *Hunt v. Great Northern Ry. Co. supra*. The right to take toll under an Act of Parliament must clearly appear, and any doubt is given in favor of the public: *Stourbridge Canal Co. v. Wheeley*, 2 B. & Ad. 792. A mere claim of right to tolls without showing that it is a *bona fide* claim would not oust the jurisdiction of the court: *R. v. Hampshire Jus.*, 3 Bowl. 47.

Custom.—This limitation is not in the English Act, and it has there been held that the County Courts may try a disputed custom: *Davis v. Walton*, 8 Ex. 153. The word appears to be used here in its technical sense, as signifying local common law: *Hammerton v. Honey*, 24 W.R. 603; *Grand Hotel Co. v. Cross*, 44 U.C.R. 169. In *Talbot v. Poole*, 15 P.R. 99, the Court of Appeal held that what is meant by a custom is some legal custom by which the right or title to property is acquired or on which it depends. Inasmuch as a custom to take fish, or to take water, would be bad as a profit *a prendre*, the jurisdiction of the Division Courts would not be excluded by setting it up: *Lloyd v. Jones*, 5 D. & L. 784. It is doubtful if a custom can be proved in this Province, there being no "time immemorial" on which to found it: *Grand Hotel Co. v. Cross*, 44 U.C.R. 153.

Franchise.—An incorporeal hereditament synonymous with liberty. A royal privilege or branch of the Crown's prerogative subsisting in the hands of a subject. It arises either from royal grants, or from prescription which presupposes a grant. The kinds are almost infinite, but the principal are bodies-corporate, the right to hold court-leets, fairs, markets, ferries, forests, chases, parks, warrens, fisheries. The remedy for disturbance is an action: 1 Step. Com. Also, the right of voting at an election of a member of parliament: *Wharton*, 313. See *Anderson v. Jellett*, 9 S.C.R. 1.

A patent is a franchise, and a question concerning its validity cannot be tried in the Division Court: *R. v. Co. Ct. Judge of Halifax*, (1891) 2 Q.B. 263.

Validity of Devise, &c., Disputed.—Whenever there is any dispute as to the validity of any devise, bequest or limitation under any will or settlement, then the jurisdiction of the Division Court to inquire into the same is at an end. Where the validity of the bequest was not disputed and no question had been raised as to the validity of the condition in the will, though the right of the devisee to assign and the right of the assignor to recover under the assignment were disputed, the jurisdiction was not ousted: *Re McGibbon v. Eager*, 18 C.L.T. 311.

Malicious Prosecution.—"To put the Criminal Law in force maliciously, and without any reasonable or probable cause, is wrongful; and if thereby another is prejudiced in property or person there is that conjunction of injury and loss which is the foundation of an action:" *Addison on Torts*, 5th ed., 199. If the particulars of a claim should show a good cause of action for false imprisonment, the proceedings in the

Division Court would not be restrained, because the Judge, in giving judgment, used expressions indicating that he gave damages for malicious prosecution: *Chivers v. Savage*, 5 E. & B. 697. Should the particulars be framed so as substantially to show a case of malicious prosecution the court cannot entertain it: *Jones v. Currey*, 2 L.M. & P. 474. In *Hunt v. North Staffordshire Ry. Co.*, 2 H. & N. 451, the particulars were as follows: "£17 12s. 6d. being for moneys paid for loss of time and attendance before the magistrates, upon a complaint and information of W. on behalf of the defendants." The plaintiff had been summoned before the magistrates for riding in a railway carriage without having paid his fare, and the summons was dismissed with costs, and the action was brought to recover the expenses occasioned by such summons. It was held that the action was, in substance, for malicious prosecution, and was beyond the jurisdiction. A count that the defendant caused plaintiff to be arrested and imprisoned without reasonable or probable cause, on a false and malicious charge of felony, is a count in trespass for assault and false imprisonment, and not a count for malicious prosecution: *Brandt v. Craddock*, 27 L. J. Ex. 314 (Amer. reprint, 3 H. & N. 958). The defendant's wife gave the plaintiff into the charge of a constable on an unfounded charge of felony. The defendant attended at the police station, and, after having been cautioned by the inspector on duty that he would not incur the responsibility of detaining the plaintiff unless the defendant distinctly charged him with felony and signed the charge sheet; the defendant signed the charge sheet, and the plaintiff was detained, and taken next morning before the magistrates, who discharged him. The plaintiff took out a plaint in a county court for false imprisonment, accompanying it with a notice, whereby he expressly disclaimed any cause of action, in respect of the malicious prosecution. The Judge, erroneously treating the signing of the charge sheet as the commencement of a malicious prosecution, ruled that the whole was one continuous transaction, and that the false imprisonment could not be separated from the rest, and consequently, that he had no jurisdiction and nonsuited the plaintiff. The Court of Common Pleas, on appeal, directed a new trial: *Austin v. Dowling*, L.R. 5 C.P. 534. An action for false imprisonment lies where anyone takes another into custody or gives him in charge of a constable without lawful justification for so doing. The defendant must prove that plaintiff gave him in charge. In an action for malicious prosecution the defendant may have simply put the law in motion, as by laying an information upon which a summons or warrant may have issued.

Libel.—"It is enough to make a written statement *prima facie* libellous, that it is injurious to the character or credit (domestic, public or professional) of the person concerning whom it is uttered, or in any way tends to cause men to shun his society, or to bring him into hatred or contempt or ridicule. When we call a statement *prima facie* libellous, we do not mean that the person making it is necessarily a wrong-doer, but that he will be so held unless the statement is found to be within some recognized ground of justification or excuse." Pollock on Torts, 206, 207; Rosecoe's N.P. 855; Odgers on Libel and Slander; Stroud, 435. See *Dickerson v. Radcliffe*, 17 P.R. 418.

Slander.—"Slander is an actionable wrong when special damage can be shown to have followed from the utterance of the words complained of, and also in the following cases:—Where the words impute a criminal offence; where they impute having a contagious disease which would cause the person having it to be excluded from society; where they convey a charge of unfitness, dishonesty, or incompetence in an office, profession or trade; in short, where they manifestly tend to prejudice a man in his calling. Spoken words which afford a cause of action without

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proof of special damage are said to be actionable *per se*: the theory being that their tendency to injure the plaintiff's reputation is so manifest that the law does not require evidence of their having actually injured it. There is much cause, however, to deem this and other like reasons given in our modern books mere after thoughts, devised to justify the result of historical accident: a thing so common in current expositions of English law that we need not dwell upon this example of it." Pollock on Torts, 206; Rosecoe's N.P. 865. See also Odgers on Libel and Slander: R.S.O. c. 57.

Criminal Conversation.—"Against an adulterer the husband had an action at common law, commonly known as an action of criminal conversation. In form it was generally trespass *vi et armis*, on the theory that 'a wife is not, as regards her husband, a free agent or separate person,' and therefore her consent was immaterial, and the husband might sue the adulterer as he might have sued any mere trespasser who beat, imprisoned or carried away his wife against her will." Pollock on Torts, 196, 197.

Strict proof of the marriage in such cases is necessary: Taylor on Ev. 8th Ed. 190, 191.

Seduction.—This cause of action is also excluded from the jurisdiction of the Division Court: Meyer v. Bell, 13 O.R. 35; Appleby v. Franklin, 17 Q.B.D. 93.

Breach of Promise of Marriage.—It will be seen, too, that the action of breach of promise of marriage is also specially excluded from Division Court jurisdiction. It is unnecessary to enlarge upon this form of action.

Actions Against a J.P.—No action can be brought against a justice of the peace in the Division Court for anything he has done in the execution of his office, if he objects thereto, nor for anything done by him in another county, not in the execution of his office: Jones v. Evan, 17 O.R. 681. This prohibition probably also applies to every other officer and person fulfilling a public duty: R.S.O. c. 88, ss. 15, 16 and 19.

If a magistrate is sued in the Division Court for an act done in the execution of his office, and he has given notice of his objection thereto, he cannot remove the suit by *certiorari* into a superior court: Weston v. Sneyd, 1 H. & N. 703. At page 705, Pollock, C.B., is reported to have said, "The notice given put an end to the proceedings in the County Court, and the plaintiff was in the same position as if the action had never been brought."

The notice which the justice may give must, we think, be in writing now: section 93. It must be given within six days from service of notice of action: R.S.O. c. 88, s. 16.

If the action be brought in any other court, and a recovery only within the jurisdiction of the Division Court, the plaintiff can only have costs on the scale of that court: Ireland v. Pitcher, 11 P.R. 403.

Contracts Ousting Jurisdiction.—It is a principle of law that parties cannot by contract oust the courts of their jurisdiction, but any person may covenant that no right of action shall accrue till a third person has decided on any difference that may arise between himself and the other party to the covenant: Scott v. Avery, 5 H.L.C. 811; Caledonian Insurance Co. v. Gilmour, (1893) A.C. 85; Tanior v. Phoenix Fire Insurance Co., 65 L.T. 825; Scott v. Mercantile Accident and Guarantee Co., 66 L.T. 811; Viney v. Bignold, 20 Q.B.D. 172. Where, by an agreement legislatively confirmed, it is provided that all differences as to the meaning and effect of the agreement or as to the mode of carrying it out shall be settled by arbitration, the jurisdiction of the courts is excluded: Caledonia Ry. v. Greenock and Wemyss Ry., L.R. 2 H.L. Sc. 347. No action lies upon an agreement by a tenant to pay for delapidations such sum as in the event of dispute shall be fixed by two valuers, until after the valuation is made: Babbage v. Coulburn, 9 Q.B.D. 235.

Friendly Societies.—The Act respecting Benevolent and Provident Societies, R.S.O. c. 211 s. 4, gives power to a society incorporated thereunder to make by-laws, rules or regulations for the government and conduct of the affairs of the society or of any branches thereof. Members of such societies should not be allowed to litigate their grievances within the society in courts of law until they have exhausted every possible means of redress afforded by the internal regulations of their societies: *Field v. Court Hope*, 26 Gr. 467; *Essery v. Court Pride of the Dominion*, 2 O.R. 596. All that is required is to see that the party complaining is a member of the society and the matter in dispute is one relating to the internal economy of the organization and provided for by its rules and regulations. In such a case the jurisdiction of the courts is practically ousted until all expedients furnished by the conventional code of laws have been resorted to: *Essery v. Court Pride of the Dominion*, 2 O.R. at p. 608; see *Denton v. Marshall*, 1 H. & C. 654.

"Matters in dispute" must mean matters in dispute between the society and its members, and not in any other capacity: *Fleming v. Self*, 3 De G. & M.G. 997, 1030; *R. v. Trafford*, 4 E. & B. 122, 131; *Farmer v. Giles*, 5 H. & N. 753, 762; *Mulkern v. Lord*, 4 App. Cas. 191.

Loan Corporations.—Loan corporations may make by-laws binding upon their members: R.S.O. c. 205 s. 8 (6), s. 67. It would seem that only disputes between the corporation and a member as such would, where the by-laws so provided, be required to be determined by arbitration, and that a dispute as to the terms upon which redemption or foreclosure should be allowed would have to be determined by the ordinary tribunals: *Mulkern v. Lord*, 4 App. Cas. 182. In England, by the Building Societies Act of 1874, it has been provided that where the rules of a building society provide that disputes must be determined by arbitration, the same must be so determined. Under this provision, actions by a mortgagee member against the society for an account have been stayed: *Wright v. Monarch Investment Building Society*, 5 Ch. D. 726; *Hack v. London Provident Building Society*, 23 Ch. D. 103; and an action cannot be entertained by the society against a member for moneys due it under a mortgage: *Municipal Building Society v. Kent*, 9 App. Cas. 260.

Other Cases.—Where a justice of the peace has jurisdiction to entertain a claim for wages and has done so, and adjudicated upon and dismissed the claim, it cannot then be sued in the Division Court: *Millet v. Coleman*, *Dawson v. Coleman*, 33 L.T. 204.

Where a rule of a building society provides that all disputes by members shall be settled by arbitration, the right to bring an action is taken away. *Ex parte Payne*, 5 D. & L. 679.

The jurisdiction is not ousted by the pendency of another action for the same cause in a superior court: *McMurray v. Wright*, 7 H. & N. 391.

It is doubtful if an action of trover for a deed is within the jurisdiction: *Guin v. Scott*, 11 U.C.R. 542.

If a witness in a Division Court suit admits that he is the real debtor, the judge has power, under Rule 115 (now Rule 213), to allow him to be substituted for the defendant: *Re Henney v. Scott*, 8 P.R. 257.

Cases in
which the
court has
jurisdiction

72.—(1) The Division Courts shall have jurisdiction in the following cases:

- (a) All personal actions where the amount claimed does not exceed \$60. R.S.O. 1887, c. 51, s. 70 (1a).
- (b) In any personal action if all the parties consent thereto in writing, and the amount claimed does not exceed \$100. 56 V. c. 15, s. 1.

(c) All claims and demands of debt, account or breach of contract, or covenant, or money demand, whether payable in money or otherwise, where the amount or balance claimed does not exceed \$100. R.S.O. 1887, c. 51, s. 70 (1b).

(d) All claims for the recovery of a debt or money demand the amount or balance of which does not exceed \$200, where the amount or original amount of the claim is ascertained by the signature of the defendant or of the person whom, as executor or administrator, the defendant represents. Interest accumulated upon any claim of this class, since the amount or balance was so ascertained by the signature of the defendant or of the person whom he represents shall not be included in determining the question of jurisdiction, but interest so accumulated may be recovered in a Division Court in addition to the claim, notwithstanding the interest and the amount of the claim so ascertained together exceed the sum of \$200. R.S.O. 1887, c. 51, s. 70 (1c); 56 V. c. 15, s. 2.

Accumulated interest on ascertained claims.

(2) In the class of cases provided for by clause (d) of subsection 1 of this section, the additional jurisdiction thereby conferred shall apply to claims and proceedings against absconding debtors under section 257, and subsequent sections of this Act; and in such cases the attachment may issue and proceedings may be had on a claim of not less than \$4 and not more than \$200.

Absconding debtors.

(3) Claims combining:

(a) A cause or causes of action in respect of which the jurisdiction of the Division Courts, is by the foregoing sub-sections of this section, limited to \$60, which causes of action are hereinafter designated as class (a),

Combining causes of action.

(b) A cause or causes of action in respect of which the jurisdiction of the said Courts is by the said subsections limited to \$100, which causes of action are hereinafter designated as class (b),

(c) A cause or causes of action in respect of which the jurisdiction of the said Courts is by the said subsections limited to \$200, which causes of action are hereinafter designated as class (c),

may be tried and disposed of in one action, and the said Courts shall have jurisdiction so to try the same; Provided that the whole amount claimed in any such action in respect of class (a) shall not exceed \$60; and that the whole amount claimed in any action in respect of classes (a) and (b) combined, or in respect of class (b) where no claim is made in respect of class (a), shall not exceed \$100, and that the whole amount claimed in respect of classes (a) and (c) or (b) and (c) combined, shall not exceed \$200, and that in respect of classes (b) and (c) combined, the whole amount claimed in respect of class (b) shall not exceed \$100.

(4) The finding of the Court upon the claims when so joined as aforesaid shall be separate. R.S.O. 1887, c. 51, s. 70 (2) (3) (4).

Jurisdic-
tion in
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Rev. Stat. c.
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(5) The Division Courts shall also have jurisdiction in all actions of replevin, where the value of the goods or other property or effects distrained, taken or detained, does not exceed the sum of \$60, as provided in *The Replevin Act*, R.S.O. 1887, c. 51, s. 72.

Personal Actions.—"Personal actions" at common law were, "Such actions whereby a man claims debt or other goods and chattels or damages for them, or damages for wrong done to the person": *Termes de la Ley*, 18; *Attorney-General v. Churchill*, 8 M. & W. 192; *Whidden v. Jackson*, 18 A. R. 440; 3 Bl. Com. 117. They comprise debt, covenant, detinue, trespass, replevin and trespass on the case, the last including all cases of wrong where the injury is not immediate or direct, but purely consequential or indirect: *Scott v. Shepherd*, 2 Bl. 892; *Hawkes v. Richardson*, 9 U.C.R. at p. 232; 1 Sm. L. C. 737.

Under section 75 every Division Court is now empowered to grant equitable relief in all actions within the jurisdiction, and to give effect to the same defences, equitable and legal, in as full and ample a manner as might or ought to be done in the like case by the High Court.

But the relief can only be given as an incident to a cause of action within the jurisdiction. A Division Court has no jurisdiction to decree the specific performance of an agreement; so that a claim for rent of premises for a period during which they are not occupied by the defendant, and where there is no legal tenancy, but a mere right to enforce an agreement for a term, is beyond the jurisdiction: *Foster v. Reeves*, (1892) 2 Q. B. 255. And so is an action to recover back money paid under the terms of an instrument, on the ground that the instrument, by fraud or mistake, does not set forth the true agreement: *Crayston v. Massey-Harris Co.*, 12 Man. L. R. 165. Or an action to declare the right to rank on an insolvent estate: *Whidden v. Jackson*, 18 A. R. 440. It may be questionable, on these authorities, whether such equitable claims as were held to be recoverable in *Re Legarie v. Canada Loan and Banking Co.*, 11 P. R. 512, and *Re McGibbon v. Eager*, 18 C. L. T. 311, are within the jurisdiction. See *infra* p. 108.

Although the claim in detinue is for a return of the goods or their value, it is a personal action: *Lucas v. Elliott*, 9 U.C.L.J. 147; and the value of the goods sought to be recovered is the test of jurisdiction: see *Taylor v. Addyman*, 13 C. B. N. S. 309; *Leader v. Rhys*, 10 C. B. N. S.

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369; *Clegg v. Barretta*, 56 L.T. 775. Such an action is founded on tort: *Bryant v. Herbert*, 3 C.P.D. 689.

A claim by a passenger against a railway company for misfeasance or positive negligence by which he is injured is founded on tort: *Taylor v. Manchester S. & L. Ry. Co.*, (1895) 1 Q.B. 135. In actions of detinue the court may order specific delivery of the chattel detained, without giving the defendant the option of detaining the chattel upon paying its assessed value: see *Winfield v. Boothroy*, 54 L.T. 574. In such actions the value of the chattel should be expressed in the judgment: see *Chilton v. Carrington*, 15 C.B. 730; *Corbin v. Lewin*, W.N. (1884) p. 62.

Where the plaintiff claims only \$60, and the evidence at the trial shows damages for a larger sum the jurisdiction is not ousted: *Bodger v. Nicholls*, 58 L.T. 441.

Consent thereto in Writing.—The provision which gives increased jurisdiction in all personal actions when the amount claimed does not exceed \$100, is one not likely to increase the usefulness of the court to any appreciable extent. It has been found in England, where the County Courts have unlimited jurisdiction in common law actions, if both parties consent thereto, that the law in that respect is practically a dead letter. "When the parties are stripped for a fight, they will not shake hands over the tribunal:" see article entitled "The County Court System," 3 L.Q.R. 1.

No provision is made for filing the consent, but it is submitted that the consent should be filed on entering the claim.

As to requisites of consent: see notes to sections 97 and 122.

Class (b): extends to all actions on contracts where moneys due or damages, not exceeding \$100, are sought to be recovered: *Morris v. Cameron*, 12 C.P. 422; *O'Brien v. Irving*, 7 P.R. 308.

The amount claimed must not be the balance of an unsettled account when such account, in the whole, exceeds \$400: see section 78.

The plaintiff cannot give the court jurisdiction by giving the defendant credit by way of set-off for an amount which the defendant has not admitted to be correct: *Furnival v. Saunders*, 26 U.C.R. 119. The set-off must be admitted by both parties: *Hubbard v. Goodley*, 25 Q.B.D. 156; but see *Lovejoy v. Cole*, (1894) 2 Q.B. 861; and it is a question of fact whether the parties have agreed to set-off one account against the other, and the decision of the judge will not be reviewed: *Re Jenkins v. Miller*, 10 P.R. 95. Where an action was brought for the balance of an account aggregating \$456.50, on which credit was given for cash payments amounting to \$361.50, leaving a balance of \$95, it was held that it did not appear on the face of the proceedings that the account was an unsettled one and for all that appeared the account, though exceeding \$400, might have been a settled account, and the balances an admitted balance, and therefore the want of jurisdiction was not apparent and that prohibition should, in the exercise of discretion, be refused: *Re Lott v. Cameron*, 29 O.R. 70.

A claim for less than \$100 by a mortgagor against a mortgagee for an alleged surplus after a mortgage sale, which realized less than \$400, may be sued under this sub-section: *Re Legarie v. Canada Loan and Banking Co.*, 11 P.R. 512; see *Re McGibbon v. Eager*, 18 C.L.T. 311. "It is an equitable cause of action for money had and received:" *Reddick v. Traders Bank*, 22 O.R. 449; but see *Hutson v. Valliers*, 19 A.R. 154; *Foster v. Reeves*, (1892) 2 Q.B. 255.

A claim for \$100 and interest would be beyond the jurisdiction: *Inslay v. Jones*, 4 Ex. D. 16; *Malcolm v. Lees*, 15 P.R. 75; *Re Lott v. Cameron*, 29 O.R. 70; *Thompson v. Pearson*, 18 P.R. 420.

An action for \$70 and in following upon an annuity under a will, is within the jurisdiction: *At Gibbon v. Eger*, 18 C.L.T. 311; and so is an action by a legatee against the devisee of lands charged with payment of the legacy if the amount claimed does not exceed \$100: see *Gray v. Richmond*, 22 O.R. 256: see notes to section 113, and notes to section 71.

A person whose goods have been wrongfully taken and sold by another may waive the tort and adopt the sale and recover the proceeds of the sale to an amount not exceeding \$100, the cause of action being an implied breach of contract by the defendant to pay over the proceeds to the plaintiff: *Kerr v. Roberts*, 17 C.L.T. 337.

Class (c).—The amount or original amount of the claim must be ascertained by the signature of the defendant or his testator or intestate. No matter how large the original amount of the claim may be, if the amount claimed in the action is less than \$200 the signature of the party for the original amount gives jurisdiction: *Bank of Ottawa v. McLaughlin*, 8 A.R. 543.

The judges are divided in opinion as to whether the liability must appear upon the instrument or whether it is sufficient to produce a writing in which an amount is mentioned, leaving it to other evidence to show whether there is a cause of action or not. The later decisions favor the latter view. In *Re Petrie v. Machan*, 28 O.R. 642, an action was brought to recover commission on the sale of goods under an instrument signed by the defendant in which he authorized the plaintiff to dispose of the goods mentioned therein for the sum of \$1000, defendant reserving to himself the right to dispose of them without the plaintiff's assistance and agreeing in the latter event to pay plaintiff ten per cent. commission on the above mentioned sum. The defendant disposed of the goods for \$350, without the assistance of the plaintiff. It was held that the plaintiff was entitled to recover the commission, and that the claim was within the jurisdiction, the original amount being ascertained by the signature of the defendant. This decision was followed in *Re Sawyer-Massey Co. v. Parkin*, 28 O.R. 662, an action brought to recover the price of a machine under a written agreement signed by the defendant in which he agreed to send the plaintiff within ten days after the machine was started, a promissory note for \$125, the price thereof; and in default the price was to become forthwith due and payable. It was held by Robertson, J. that there was no jurisdiction, as the amount was "not ascertained by the signature of the defendant" under this clause, for in addition to proof of the signature, evidence was necessary to show that the terms of the agreement had been performed by the plaintiffs. This decision was reversed on appeal to the Divisional Court, and a mandamus ordered to issue.

This view was also held in *Graham v. Tomlinson*, 12 P.R. 367. At page 370 Armour, C.J., said, "The statute does not require that the debt shall be ascertained nor that the claim to recover shall be so ascertained, but only that the amount shall be ascertained." See also *Thompson v. Pearson*, 18 P.R. 420.

The cases just mentioned were decided by the Queen's Bench Divisional Court.

The contrary view has been held by the Court of Appeal, the Chancery Divisional Court and by Rose, J.

ASCERTAINED CLAIMS.

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The following table exhibits the views which have been taken in the several cases where the question has arisen.

TABLE OF CASES.

DATE.	CASE.	INSTRUMENT SIGNED.	COURT.	DECISION.
1881 May 14.	McCracken v. Creswick, 8 P.R. 501.	Pro. Note for \$73.14 with interest. Am't claimed, \$103.44.	Hagarty, C.J.	Fixed legal damages in the nature of interest need not be under signature of defendant, the original amount being fixed.
1881 Dec. 30.	Re Widmeyer v. McMahon, 32 C.P. 187.	Pro. note for \$158 with interest. Amount claimed, \$185.65.	C.P.D.	McCracken v. Creswick followed.
1883 Feb. 6.	Wiltse v. Ward, 8 A.R. 549.	Accepted order for \$140 payable on condition of fulfilment of contract.	Spragge, C.J.O.	No jurisdiction.
1883 Dec. 21.	Forfar v. Climie, 10 P.R. 80.	Action on order for boiler. Price \$115.	Rose, J.	Writing ascertains only amount that might become due. No jurisdiction.
1888 Feb. 6.	Re Graham v. Tomlinson, 12 P.R. 367.	Indorsement on cheque for \$100. Action for \$100 loaned and \$22 interest.	Q.B.D.	Sufficient if the amount ascertained by any writing adduced in evidence.
1888 June 29	McDermid v. McDermid, 15 A.R. 287.	Bond for \$500 conditioned to pay mortgage for \$250. Plaintiff paid \$163.	C.A.	The debt or money demand arises from payment of the money, and the amount is not ascertained by the writing in the sense required to give jurisdiction.
1890 Jan. 9.	Moses v. Moses, 13 P.R. 12.	"This is to insure my son Joseph to take \$100 from his sister Hannah's share to repay money lent to her. If I live till this time next year I will settle with him."	Robertson, J., Ch.D.	"The plaintiff having to establish consideration outside the paper the debt is not ascertained by proving the signature alone"
1890 Aug. 5.	Kinsey v. Roche, 8 P.R. 515.	Joint note for \$169 paid by surety. Action by him to recover.	Osler, J.	Action not on note, but for money paid. No jurisdiction.
1890 May 30.	Re Smith v. Grant, 10 C.L.T. 190.	"Good to Sam Smith on presentation in person \$150.78 during summer of 1884 as per amount deposited with me.	Street, J.,	The acknowledgment was given after liability accrued and was an acknowledgment of an existing liability.
1892 June 25.	Re Trimble v. Miller, 22 O.R. 500.	Undertaking to pay third party \$3.75.	C.P.D.	Even if pro. note, only ensured to benefit of third party, and plaintiff could sue only for breach of undertaking.
1894 March 2.	Re Wallace v. Virtue, 24 O.R. 558.	Covenant in lease to pay \$210 rent.	Street, J.	The fact that the defendant might have a defence by some act subsequent to making the covenant not sufficient to oust jurisdiction.

ASCERTAINED CLAIMS.

TABLE OF CASES—Continued.

DATE.	CASE.	INSTRUMENT SIGNED.	COURT.	DECISION.
1894. June 4.	<i>Re</i> Shepherd v. Cooper, 25 O.R. 274.	Agreement to pay \$250 rent for premises with use of ushers, bill boards, &c.	Boyd, C.	The plaintiff must prove that all the appliances were furnished. If evidence has to be given to show performance of contract, no jurisdiction.
1894. Nov. 19. 1895 March 28.	<i>Re</i> Armacost v. Smith, 14 C.L.T. 514. 15 C.L.T. 67.	Agreement to pay \$200 in a very short time.	Street, J. Q.B. Divisional Court	That the acknowledgment being after liability accrued the amount was ascertained by signature of defendant.
1895. Nov. 19.	Babeock v. Ayres, 27 O.R. 47.	A promise to pay \$400 in three annual instalments with interest at 6 per cent. per annum.	Street, J.	A promissory note payable by instalments upon each of which an action would lie and that each instalment was an amount ascertained by signature of defendant.
1897. Oct. 25.	Petrie v. Machan, 28 O.R. 642.	Agreement to pay ten percent. commission on \$1000 on sale of goods, &c.	Q.B. Divisional Court.	The original amount was ascertained by signature of defendant and the court had jurisdiction.
1897. Dec. 6.	Sawyer-Massey Co. v. Parkin, 28 O.R. 662.	Agreement for sale of machine under which defendant was to send plaintiffs a note for \$125, the price of it, within 10 days after the machine was started and in default the price should forthwith become due and payable.	Q. B. Divisional Court.	That the amount was ascertained by signature of defendant under this section.

THERE ARE ALSO THE FOLLOWING CASES IN INFERIOR COURTS.

DATE.	CASE.	INSTRUMENT SIGNED.	COURT.	DECISION.
1881. Jan.	Stewart v. Forsyth, 17 C.L.J. 87.	Order for reaping machine to be supplied and agreement to give notes therefor.	C. C. Middlesex.	The original amount ascertained.
1881. April 14.	Burns v. Rogers, 17 L.J.N.S. 209.	Pro. Note.	C. C. Leeds.	That notarial recoverable as ascertained.
1881. Feb.	Manufacturers and Mer. M. Ins. Co. v. Campbell, 1 C.L.T. 134.	Premium Note for \$155.96.	1st Div. Ct. Wentworth.	Not an absolute promise to pay a certain sum at a fixed time.

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The principle involved in the following County Court cases is applicable in Division Court actions under this sub-section. Where a sum not exceeding the jurisdiction is agreed upon as the remuneration for services to be performed or as the price of an article sold, if the service be performed or the article be delivered in pursuance of the bargain the amount may be recovered, and denial of the contract and price by the defendant, will not oust the jurisdiction: *Ostrom v. Benjamin*, 21 A.R. 467. See also *Robb v. Murray*, 16 A.R. 503.

The ascertainment of the amount by the debtor is not binding on a guarantor, there being no liquidation or ascertainment of amount between the vendor and the guarantor: *Thompson v. Eede*, 22 A.R. 105.

A claim for one per cent. commission made on agreement to pay that percentage on the sale of certain lands, which were afterwards sold for \$25,000, was said to be "ascertained by the Act of the parties, or by the signature of the defendant," under the provisions of section 32 (2) of the County Courts Act: *Re McKay v. Martin*, 21 O.R. 104; see also *Wallbridge v. Brown*, 18 U.C.R. 158; *Hagar v. Jackson*, 16 P.R. 485; *Watson v. Severn*, 6 A.R. 559; *Durnin v. McLean*, 10 P.R. 295; *Cushman v. Reid*, 20 C.P. 147; *Brown v. Hose*, 14 P.R. 3.

The amount must be ascertained by the signature of the defendant prior to the commencement of the action: see *Lucas v. Dixon*, 22 Q.B.D. 357; *Re Graham v. Tomlinson*, 12 P.R. 367; *White Sewing Machine Co. v. Belfry*, 10 P.R. 64; *Robb v. Murray*, 16 A.R. 503.

Though the plaintiff may sue in a higher court upon the original consideration, he will not obtain the costs of that court if the amount has been ascertained by the signature of the defendant, as by an acceptance: *White Sewing Machine Co. v. Belfry*, 10 P.R. 64; see *Vanderwaters v. Horton*, 9 O.R. 548; *Brown v. Hose*, 14 P.R. 3.

A claim aggregating more than \$100, made up of two amounts, one ascertained by signature and the other not so, was formerly beyond the jurisdiction: *Re Walsh v. Elliott*, 11 P.R. 520; but this is not now law, as class (c) above could not, as the law then stood, be combined with classes (a) or (b).

Interest.—Formerly the law was that when interest would bring the amount over \$200 the excess had to be abandoned, or prohibition would be awarded either *quo usque* until the judgment should be reduced to the proper amount, or partially as to the excess: *Re Young v. Morden*, 10 P.R. 276; *Re Elliott v. Biette*, 21 O.R. 595; *Re Lott v. Cameron*, 29 O.R. 70. But now interest in excess of \$200 may be added to claims ascertained by the signature of the defendant: see *Pegg v. Howlett*, 28 O.R. 473.

What is a Signature.—A signature is the writing or otherwise affixing a person's name, or a mark to represent his name, by himself or by his authority: *R. v. Justices of Kent*, L.R. 8 Q.B. 305; 42 L.J.M.C. 112.

A stamped impression is sufficient: *Jenkyns v. Gaisford*, 3 Sw. & Tr. 93; *Bennett v. Brumfitt*, L.R. 3 C.P. 28. A mark is sufficient even though the name should not be affixed: *Baker v. Dening*, 8 A. & E. 94; *Re Field*, 3 Curt. 752; or if a wrong name should be written: *Re Glover*, 11 Jur. 1022; or an assumed name: *Re Redding*, 14 Jur. 1052. Initials are perfectly good: *Re Wingrove*, 15 Jur. 91. The signature may be either at the top or bottom: *Durrell v. Evans*, 1 H. & C. 174; and even the name of the debtor on a printed billhead upon which the ascertainment of the amount appeared would perhaps be sufficient: *Schneider v. Norris*, 2 M. & S. 286; *Evans v. Hoare*, (1892) 1 Q.B. 593. A signature by an agent would be sufficient: *R. v. Justices of Kent*, L.R. 8 Q.B. 305. A forgery cannot be ratified: *Merchants Bank v. Lucas*, 18 S.C.R. 704.

By the English County Court Rules, 1889, particulars of claim were required to be signed by a solicitor. A lithographed signature is insufficient: *R. v. Cowper*, 24 Q.B.D. 533; but signature by an authorized clerk is sufficient: *France v. Dutton*, (1891) 2 Q.B. 208. It is not necessary that the signature should show the agency: *Re Whitley Partners (Limited)*, 32 Ch. D. 337. Even the signature in the agent's own name would probably be sufficient: *Commins v. Scott*, L.R. 20 Eq. 11; *Wylson v. Dunn*, 34 Ch. D. 575. It would not be necessary that the agent's authority should be in writing: *Emmerson v. Heelis*, 2 Taunt. 38.

"The most usual mode is by an unwritten request or by implication from the recognition of the principal or from his acquiescence in the act of the agent": *Evans Prin. & Agents*, 21.

But mere proof that an agent has been recognized as such in other transactions would be insufficient: *Myles v. Thompson*, 23 U.C.R. 553; *Spooner v. Browning*, (1898) 1 Q.B. 528.

The authority might be by telegram: *Marshall v. Jamieson*, 42 U.C.R. 115; *Lilly v. Smales*, 8 T.L.R. 410. Instruments which are defective as promissory notes, either for uncertainty or as containing other agreements, or for any other causes, would be sufficient acknowledgments within this section: *Palmer v. Fahnestock*, 9 C.P. 172; 20 U.C.R. 307; *Grant v. Young*, 23 U.C.R. 387; *Third National Bank of Chicago v. Coshay*, 41 U.C.R. 402; 43 U.C.R. 58.

An assignee of the debt might maintain the action: *R.S.O. c. 51, s. 58 (5)*.

Even though particulars of the claim show an excess over \$200, this excess may be abandoned at the trial: *Re White v. Galbraith*, 12 P.R. 513; *Bodger v. Nicholls*, 28 L.T. 441; Rule 7; notes to section 78.

Jury.—See section 160; rule 156. The section appears to overlook section 174, allowing the judge to call a jury upon his own motion to try any disputed fact.

Absconding Debtors.—It will be noticed that a claim against an absconding debtor must not exceed \$100, unless the amount is ascertained by the signature of the defendant: See section 257 and notes thereto; Rules, 27 to 31 inclusive.

Combining Causes of Action.—The following are examples of claims which may be combined:

\$60 for tort, and \$140 on promissory note.

\$60 for tort, \$40 on open account, \$100 on note.

\$10 for tort, \$90 damages for breach of contract, \$100 on note.

\$99 for damages for breach of contract and \$101 on note.

\$50 damages for breach of contract, \$50 open account, and \$100 on note.

\$100 on note, \$40 for tort and \$60 open account.

The joinder of several distinct causes of action against the same defendant is authorized, but not the joinder of several actions against distinct persons: *Burstall v. Beyfus*, 26 Ch. D. 35; *McLaughlin v. Schaefer*, 13 A.R. 253; *Thompson v. Eede*, 22 A.R. 105; *McMurtry v. Munroe*, 14 U.C.R. 166; *Smurthwaite v. Hannay*, (1894) A.C. 494; *Peninsular and Oriental S.S. Co. v. Tsune Kijima*, (1895) A.C. 661; *Sadler v. Great Western Ry. Co.*, (1895) 2 Q.B. 688; (1896) A.C. 450; *Faulds v. Faulds*, 17 P.R. 480; see also notes to section 78.

Claims by and against husband and wife may be joined with claims by or against either of them separately: Rule 232.

Claims by or against an executor or administrator as such may be joined with claims by or against him personally if they arise with reference to the estate in respect of which he is executor or administrator: Rule 100 (c).

REPLEVIN.

Jurisdiction in Replevin.—Formerly the value of the property recoverable in replevin was limited to \$40. Now it is extended to \$60. The Replevin Act is R.S.O. c. 66; see Rules 38-46.

By Rule 49, it is provided, that "Where a writ of replevin is issued out for any personal property which had not been previously taken out of the plaintiff's possession, and for which the plaintiff might have brought an action of trespass or trover, the defendant shall be entitled, if the plaintiff fails in the action, to be fully indemnified against all damages sustained by the defendant, including any extra costs which he may incur in defending the action; and the bond to be taken by the bailiff shall be conditioned not only as heretofore required in that behalf, but also to indemnify and save harmless the defendant from all loss and damage which he may sustain by reason of the seizure, and of any deterioration of the property in the meantime, in the event of its being returned, and all costs, charges and expenses which the defendant may incur: This rule shall not apply to cases of distress for rent or damage feasant." See C.R. 1074.

This provision was inserted to provide for the defect shown to exist in the law in *Williams v. Crow*, 10 A.R. 301.

The following are the sections of the Replevin Act applicable to Division Courts:—

WHEN GOODS REPLEVIABLE.

"2. Where goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities or other personal property or effects have been wrongfully distrained under circumstances in which by the law of England, on the 5th day of December, 1859, replevin might have been made, the person complaining of such distress as unlawful, may bring an action of replevin, or where such goods, chattels, property or effects have been otherwise wrongfully taken or detained, the owner or other person capable of maintaining an action for damages therefor may bring an action of replevin for the recovery of the goods, chattels, property or effects, and for the recovery of the damages sustained by reason of the unlawful caption and detention, or of the unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses. R.S.O. c. 66, s. 2; Rule 39.

"3. No party to an action or proceeding, in any court, shall replevy or take out of the custody of the sheriff, bailiff, or other officer, any personal property seized by him under process against such party. R.S.O. c. 66, s. 3; Rule 40.

REPLEVIN IN DIVISION COURTS.

"8. (1) In case the value of the goods or other property or effects distrained, taken or detained, does not exceed the sum of \$60, and in case the title to land is not brought in question, the action may be brought in the Division Court for the division within which the defendant or one of the defendants resides or carries on business, or where the goods or other property or effects have been distrained, taken or detained. See Rule 42.

"(2) The matter shall then be disposed of without formal pleadings, and the powers of the courts and officers, and the proceedings generally

shall be, as nearly as may be, the same as in other cases which are within the jurisdiction of Division Courts." R.S.O. c. 66, s. 8; see Rule 63.

Formerly, the question of title to land did not oust the jurisdiction in replevin (see *Fordham v. Ackers*, 4 B. & S. 578), but it now excludes jurisdiction in such cases: see notes to section 71, sub-sec. 4.

In replevin, a verdict or judgment is divisible, so that the plaintiff may recover for whatever part of the goods he is entitled to and the defendant for the rest: *Sills v. Hunt*, 16 U.C.R. 521; *Haggart v. Kernahan*, 17 U.C.R. 341; *Henderson v. Sills*, 8 C.P. 68; *Caniff v. Bogart*, 6 U.C.L.J. 59; *Roseoe's N.P.* 1070.

Notice of action is not necessary in replevin: *Lewis v. Tonle*, 32 U.C.R. 108; *Folger v. Minton*, 10 U.C.R. 423; *Manson v. Gurnett*, 2 P.R. 389; *Gay v. Matthews*, 4 B. & S. 436; notes to section 298.

When Replevin will Lie.—Wherever trespass is maintainable, so also is the action of replevin: *Brown v. Zimmerman*, 15 U.C.R. 568.

Any person out of whose possession books, etc., have been taken, whether by force or fraud or without right, may replevy under our statute; but when the right to the custody and possession depends on the holding of an office, it should appear that the applicant holds the office and is, therefore, entitled to such books, etc.: *Hammond v. McLay*, 10 U.C.L.J. 269; and replevin will lie though there has been no wrongful taking but a detention merely, for every detention is a new taking: *Deal v. Potter*, 26 U.C.R. 578; *Gates v. Bent*, 31 N.S.R. 544.

An equitable title will support an action of replevin: *Carter v. Long*, 26 S.C.R. 430, see also *Connell v. Hickock*, 15 A.R., 518.

A person in possession of goods may have no right against the true owner, yet may have a right to maintain replevin against a wrong doer: *Gilmour v. Buck*, 24 C.P. 187; therefore one who has bare possession may maintain the action against a wrong doer: *Id.*; *Meyerstein v. Barber*, L.R. 2 C.P. 661; L.R. 4 H.L. 317. And if an agent is entrusted with money to buy goods the principal has the same interest in the goods bought as he had in the funds producing them; and if the goods are mixed with those of the agent the principal may replevy a quantity to be taken from the mass equivalent to the portion of the money used in the purchase, as well as the unexpended balance: *Carter v. Long*, 26 S.C.R. 430. In *Smalley v. Gallagher*, 26 C.P. 531, it was held that where an action of replevin is brought on the ground that the facts would sustain an action of trover, the fact of conversion must be clearly established. But see R.S.O. c. 66, s. 2, in which it is provided that where goods, etc., have been "otherwise wrongfully detained, the owner or other person capable of maintaining an action for damages therefor may bring an action of replevin," etc., and for the recovery of damages.

One who is entitled to possession as agent of a foreign corporation, the owner, is entitled to maintain replevin in his own name: *Coquillard v. Hunter*, 36 U.C.R. 316.

The claimant of goods seized and sold by a bailiff under an execution may maintain replevin against the purchaser of the goods: *Reid v. McDonald*, 26 C.P. 147. In such a case the bailiff cannot sell the goods and issue an interpleader for the proceeds; but if he sells the goods and claim is made to the proceeds, he may interplead therefor: *Id.*, p. 163. A third party claiming goods as his own which are seized and sold under an attachment from the Division Court, can maintain replevin in a superior court, as the attachment is not against him: *Arnold v. Higgins*, 11 U.C.R. 191; R.S.O. 66, s. 3; see *Jameson v. Kerr*, 6 P.R. 3, *Anderson v. McEwen*, 8 C.P. 532; *Barelay v. Sutton*, 7 P.R. 14; *Burke v. McWhirter*, 35 U.C.R. 1. But such action would probably not be favored unless the bailiff refused to interplead under sections 277 *et seq.*

The legal representative of a deceased owner may maintain replevin against the purchaser of goods sold by a person who had agreed to manage a farm for the latter in consideration of his getting, amongst other things, one third of the increase of young stock and who illegally holds all the stock: *Duffill v. Erwin*, 18 U.C.R. 431. The owner of goods may replevy them from a workman although there may be moneys due to the latter for work done on the goods on a settlement of accounts between them: *Bush v. Pimlott*, 9 C.P. 54.

If the vendor has no title, the purchaser can have none, and the true owner can replevy: *Kerby v. Cahill*, 6 O.S. 510; *Lecky v. McDermott*, 8 S. & R. 500; *Cundy v. Lindsay*, 2 Q.B.D. 96; 3 App. Cas. 489; and the true owner of goods stolen, or found, or bought from someone who has no authority to sell, may replevy them no matter where found, notwithstanding that they have been sold at public sale: *McKinley v. McGregor*, 3 Whar. 396; *Buffington v. Gerrish*, 15 Mass. 156; *Rowley v. Bigelow*, 12 Pick. 307, or transferred to an assignee for benefit of creditors: *Farley v. Lincoln*, 51 N.H. 577; *Thompson v. Rose*, 16 Conn. 71; and the owner can replevy from the buyer or anyone else who is in possession of a chattel sold by one who has borrowed it: *Roland v. Gundy*, 5 Ohio 202.

There is no market overt in Ontario, and a purchaser cannot, as in England, acquire title by purchase in a public market place, as against the owner: see *Hargrave v. Spink*, (1892) 1 Q.B. 25.

Replevin may be brought upon a distress for school rates (and no notice of action is necessary in such case): *Applegarth v. Graham*, 7 C.P. 171; *Spry v. McKenzie*, 18 U.C.R. 161; see also *Gillies v. Wood*, 13 U.C.R. 357; *Haacke v. Marr*, 8 C.P. 441; but where some of the rates are collectable and others not, the rates legally collectable must be first paid: *Corbett v. Johnston*, 11 C.P. 317; see also *Anglin v. Minis*, 18 C.P., *per* Wilson, J., at p. 174. The legal rates must separately appear on the collector's roll to justify the distress: *Hurrell v. Wink*, 8 Taunt. 369; *Sibbald v. Roderick*, 11 A. & E. 38; *Coleman v. Kerr*, 27 U.C.R. 13; *Squire v. Mooney*, 30 U.C.R. 531; *Victoria M. F. Ins. Co. v. Thomson*, 9 A.R. 620.

Replevin will also lie, for goods sold so that the property in them vests in the purchaser: *O'Rourke v. Lee*, 18 U.C.R. 607. Also by the hirer of a chattel hired on the terms of certain monthly payments which, when complete, will vest the property in the person to whom it is hired, on default of payment of the instalments: *Mason v. Johnson*, 27 C.P. 205; *Nordheimer v. Robinson*, 2 A.R. 305; *Walker v. Hyman*, 1 A.R. 345; *McDonald v. Forestal*, 29 Gr. 300; 9 S.C.R. 12; *Weeks v. Lalor*, 8 C.P. 237; *Bush v. Fry*, 15 O.R. 122; but a demand should be first made therefor: *Tufts v. Mottashed*, 29 C.P. 539; also for goods in hands of a guardian in insolvency under the Insolvent Act: *Jameson v. Kerr*, 6 P.R. 3; for goods seized by the sheriff under execution: *per* Townshend, J., *Mulcahy v. Archibald*, 30 N.S.R. 12; also for goods obtained by fraud or upon a preconceived design not to pay for them: *Higgins v. Barton*, 26 L.J. Ex. 342; *Kingsford v. Merry*, 11 Ex. 577; *Clough v. London & N.W. Ry. Co.*, L.R. 7 Ex. 26; *Cundy v. Lindsay*, 3 App. Cas. 459; *McCullis v. Allen*, 57 Vt. 505. But an innocent party purchasing from the fraudulent purchaser would be protected: *White v. Garden*, 10 C.B. 19; *Stoesser v. Springer*, 7 A.R. 497. Formerly, if the fraudulent purchaser were convicted of false pretences, the property would revert to the original vendor even as against an innocent purchaser: *Bentley v. Vilmont*, 12 App. Cas. 471; R.S.C. c. 174, s. 250; but see now Criminal Code 1892, s. 838, under which an innocent purchaser is protected even if his vendor has been convicted of false pretences. Replevin will also lie for a swarm of bees: R.S.O. c. 117; for money in a box or for leather made into shoes if sufficiently identified, and for the increase of animals *feræ naturæ* and unclaimed: *Morris on Replevin*, 101; also for a ship and her sails:

Marsh, 110; Prideaux v. Warne, Sir T. Raym. 132; for a vessel acquired under proceedings *in rem* in a foreign Admiralty Court: VanEvery v. Grant, 21 U.C.R. 542; Castrique v. Imrie, L.R. 4 H.L. 414; see Dunsmuir v. Klondike & Columbian Gold Fields, Ltd., 6 B.C.R. 200; for growing timber sold and cut into logs by the purchaser as against the owner of the land: McGregor v. McNeil, 32 C.P. 538; for leases and other title deeds: Burr v. Munro, 6 O.S. 57; Anderson v. Hamilton, 4 U.C.R. 372; Dowling v. Miller, 9 U.C.R. 227; for goods distrained off premises: Huskinson v. Lawrence, 26 U.C.R. 570; for growing crops: Glover v. Coles, 7 Moore 231; for goods seized under a warrant of conviction and removed from the county in which the seizure was made and there detained; the removal from the county being unjustifiable, and the detention there being a trespass *ab initio*: Hoover v. Craig, 12 A.R. 72. Where the goods of A. having been seized by the sheriff under an execution against D. had been handed over by the sheriff to an assignee to whom B. had made a voluntary assignment in insolvency, it was held that A. might maintain replevin against the assignee: Burke v. McWhirter, 35 U.C.R. 1.

In order to maintain an action against a lien holder, the lien must be first discharged, or an offer or tender of the amount of the lien made: Luke v. Biggar, 11 C.P. 170; McMillan v. Byers, 15 S.C.R. 194. But a tender properly made and improperly rejected is not equivalent to payment in the case of a mortgage, and replevin for the title deeds would not lie: Bank of New South Wales v. O'Connor, 14 App. Cas. 273. The remedy is an action for redemption: *Ib.* In replevin for goods seized for taxes it must distinctly be shown by the defendant that such goods are liable to distress in order to justify the seizure: Sargeant v. City of Toronto, 12 C.P. 185; see Robins v. Coffee, 9 O.R. 332.

The provisions of the Municipal Act which prevent actions being brought for anything done under a by-law, until such by-law has been quashed, do not apply to replevin: Wilson v. The Corp. of Middlesex, 18 U.C.R. 348. Where one person wrongfully intermingles his property with that of another, all the property whose property is intermingled can require is that he should be permitted to take from the whole an equivalent in number and quality for that he originally possessed: McDonald v. Lane, 7 S.C.R. 462; see Carter v. Long, 26 S.C.R. 430.

Whether there has been a taking or detention is a matter of defence at the trial: Gilchrist v. Conger, 11 U.C.R. 197.

Where Goods Not Repleviable.—A mere servant of the owner cannot bring replevin; nor one who never had lawful possession: Cool v. Mulligan, 13 U.C.R. 613. If neither trespass nor trover would be maintainable neither would replevin: Caron v. Graham, 18 U.C.R. 315; Schaffer v. Dumble, 5 O.R. 716; except in cases where it would be maintainable at common law: *Ib.* See R.S.O. c. 66, s. 2; note p. 91, *supra*.

It has been held that replevin will not lie in the following cases:

For a chattel seizure by a collector of customs for breach of the revenue laws: Scott v. McRae, 3 P.R. 16; by a purchaser to whom neither possession nor property in the chattel has passed: Bloxam v. Sanders, 9 B. & C. 941, Henry v. Cook, 8 C.P. 29; nor if there is not a contract within the Statute of Frauds: Keating v. Parkin, 23 C.P. 569; for goods in the hands of an official assignee under the Insolvent Act of 1879: Barclay v. Sutton, 7 P.R. 14; see also Campbell v. Lepan, 21 C.P. 363; against a pound-keeper: Ibbotson v. Henry, 8 O.R. 625; for goods seized under a distress warrant for non-payment of a fine imposed by a conviction, if sought to be replevied by the person against whom the distress issued, unless the magistrate acted without jurisdiction: Hannagan v. Burgess, 8 C.L.T. 193.

Estoppel.—The defendant may be estopped by acquiescence from disturbing goods in the defendant's possession: *O'Shaugnessy v. Ball*, 21 S.C.R. 415.

Demand.—The same evidence of demand is necessary in replevin as in trover and for the same cause: *Smalley v. Gallagher*, 26 C.P. 531.

In replevin against one person, goods cannot be taken out of the peaceable possession of another without notice or demand: *G. W. Ry. Co. v. McEwan*, 28 U.C.R. 528; *Hoorigan v. Driscoll*, 8 P.R. 184.

Where goods are in the possession of defendant under the terms of a hire receipt, such demand is necessary before replevin: *Tufts v. Mottashed*, 29 C.P. 539.

Application for Writ.—In ordinary cases application must be made to the judge for an order upon an affidavit "by the person claiming the property, or some other person," showing to the satisfaction of the judge (1) the facts of the wrongful taking or detention complained of; (2) the value and description of the property taken or detained; (3) that the person claiming is the owner of the property or lawfully entitled to the possession thereof (as the case may be): Rule 43 (1). For form of affidavit see Form 61.

Upon the application the judge may proceed *ex parte* or may direct notice to be served on the defendant to show cause why the writ should not issue, and may, on the *ex parte* application, or on the return of the motion to show cause, grant or refuse the writ; and may impose any terms in granting or refusing the writ as under the circumstances in evidence appears just: Rule 44.

When Writ may Issue Without an Order.—The summons in replevin may be issued without an order from the judge if the "person claiming the property, *his servant or agent*," makes an affidavit entitled in the court out of which the writ is to issue, stating: (a) That the person claiming the property is the owner thereof (describing the property in the affidavit); (b) the value of the property to the best of his belief; (c) that the property was wrongfully taken out of the possession of the claimant, or was fraudulently got out of his possession, within two calendar months next before the making of the affidavit; (d) that the deponent is advised and believes that the claimant is entitled to an order for the writ; (e) and that there is good reason to apprehend that unless the writ is issued without waiting for an order, the delay would materially prejudice the just rights of the claimant in respect to the property: Rule 43 (2). For form of affidavit see Form 62.

Within Two Calendar Months.—See notes to section 41 *ante* p. 32. An order must afterwards be obtained within fourteen days after the seizure of the goods: Rule 50.

On Distress for Rent or Damage Fasant.—When property is distrained for rent or damage fasant, no order is required before issuing the writ. But an affidavit by the claimant, "*his servant or agent*," must make and file an affidavit in the same terms as in clauses (a) and (b) of Rule 43 (1), and adding: "That the property was taken under color of a distress for rent or damage fasant." In such case the writ shall state that "the defendant has taken and unjustly detains the property, under color of a distress for rent, or for damage fasant (as the case may be):" Rule 43 (3).

As to who may distrain animals, damage fasant seems to depend upon the possession of the land to which or upon which the injury is done: see *Boden v. Roscoe*, (1894) 1 Q.B. 608.

Animals trespassing, or, as it is called, "damage fasant" (doing damage) may be distrained by the person upon whose land they are trespassing if taken at the time of the trespass: *Warner v. Biggs*, 2 C.

& K. 31. Hogs, pigeons, chickens, snares, nets, etc., may also be distrained damage feasant: Bacon's Abr. tit. Distress, F.; but they must not be at the time in actual possession and use, or under the actual personal control of some person. A horse on which one is riding, for instance, cannot be distrained: Field v. Adames, 12 A. & E. 649; or a net which is in a man's hand at the time: Hoskins v. Robins, 2 Saund. 328; Storey v. Robinson, 6 T.R. 138; but a dog within whistle might be: Bunch v. Kenington 1 Q.B. 680. Pigeons might be shot: Hannan v. Mockett, 2 B. & C. 939; but not chickens: Anderson's Dictionary, 305. A railway company may distrain engines and trucks encumbering their line: Ambergate Ry. Co. v. Midland Ry. Co., 2 E. & B. 793. If cattle escape and do damage owing to defects in a fence which the person who is damaged was bound to maintain, under a municipal by-law, the distress would be illegal: Ives v. Hitchcock, Dra. 247; Singleton v. Williamson, 7 H. & N. 410.

If a tender is made of sufficient amends before animals are impounded in a common pound, the owner may sustain replevin: Gullivar v. Cozens, 1 C.B. 788; Vertue v. Beasley, 1 Moo. & R. 21; but replevin will not lie against a pound keeper: Ibbottson v. Henry, 8 O.R. 625; or the owner may pay the amount demanded and recover any sum in excess of the damage as money had and received: Green v. Duckett, 11 Q.B.D. 275.

Putting down poisoned meat to kill trespassing dogs: Daniel v. Jones, 2 C.P.D. 351; or shooting fowls while trespassing: Smith v. Williams, 9 T.L.R. 9, is not a criminal offence.

Distress for damage feasant may be made, not only for damage to the freehold, but for injuries to other animals: Boden v. Roscoe, (1894) 1 Q.B. 608.

Sheep herded by a boy upon an open common are not running at large in contravention of a by-law of the municipality on the subject and a constable who impounds them is liable in replevin for so doing: Ibbottson v. Henry, 8 O.R. 625; nor can cattle straying on to open land or into an open shop from the highway be distrained, if they are lawfully travelling on such highway, unless left an unreasonable time: Tillett v. Ward, 10 Q.B.D. 17.

Summons in Replevin.—In actions of replevin the first process shall be a writ of replevin and summons, called "summons in replevin" (Form No. 64). The description and value of the property shall be stated in the writ: Rule 45.

No other cause of action shall be joined in the summons: Rule 41; G.W. Ry. Co. v. Chadwick, 3 U.C.L.J. 29; see Morgan v. Wheatley, 6 Ex. 88, at p. 97.

Court in which Action may be Brought.—The action may be brought in the division within which the defendant or one of the defendants resides or carries on business, or where the goods or other property or effects have been distrained, taken or detained: Rule 42; Replevin Act, s. 8 (1). As to where the defendant "resides or carries on business," see notes to section 84.

Security.—Before the bailiff acts on the writ he must take a bond, with sufficient sureties, in treble the value of the property to be replevied, as stated in the writ. The bond shall be assignable to the defendant, and the bond and assignment thereof may be in the words or to the effect in the forms Nos. 65 and 66, the condition being varied to correspond with the writ: Rule 47. But where an application is made to the judge for an order, he may direct the bailiff to take a bond in less or more than treble the value of the property, or may direct him to take and detain the property until the further order of the judge, instead of replevying the same at once to the plaintiff: Rule 44.

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Should the bailiff not take a bond, the seizure should be set aside: *Lawless v. Radford*, 9 P. R. 33; and an action would lie against the bailiff and his sureties for taking an insufficient bond: *Norman v. Hope*, 13 O.R. 556. In taking the security the bailiff should, therefore, exercise reasonable discretion in deciding upon the sufficiency of the sureties. See note *infra*, "Replevin Bond."

Particulars.—On entering a claim in replevin, the plaintiff must specify and describe, in a statement of particulars, the property, etc., distrained, taken or detained, and the distress or other taking or detention of which he complains: Rule 46; Form 63. The description should be sufficiently clear to enable the bailiff to identify the property: *Jones v. Cook*, 2 P.R. 396; *Hoorigan v. Driscoll*, 8 P.R. 184; "98 logs" would be insufficient: *Ib.*; "230 sheep and lambs" would be insufficient: *Ib.* Where the action is brought for the detention of the goods only, the claim should be framed in detinue: *Stephens v. Cousins*, 16 U.C.R. 329; and a lien cannot be given in evidence under a plea denying the plaintiff's property: *Ib.*

Executing the Writ.—A bailiff would be liable for not executing the writ: *Boys v. Smith*, 9 C.P. 27. By rule 51 the bailiff is required to publicly demand deliverance from the owner *and* occupant of any dwelling house or enclosure in which any property to be replevied is concealed or secured, and if such property is not delivered up to him within twenty-four hours, he may break open the house or enclosure for the purpose of effecting the seizure. But the Replevin Act, R.S.O., c. 66, ss. 4 & 5, supersedes the rule, and under that Act a bailiff may upon a reasonable supposition of concealment break open any dwelling house within six hours, and any other enclosure forthwith after demand. This provision, as well as that of the rule, is an invasion of the maxim, "Every man's house is his castle:" see *Semayne's case*, 1 Sm. L.C. 228; *Ameriean Concentrated Meat Company v. Hendry*, W.N. (1893) 67, 82; 5 R. 331; *Long v. Clarke*, (1894) 1 Q.B. 119.

If the property is not secured or concealed in the place broken open, the bailiff is, under the rule, a trespasser: *Ratcliffe v. Burton*, 3 B. & P. 229; *Johnson v. Leigh*, 6 Taunt. 244. Inner doors may be broken open without waiting twenty-four hours, if entry is effected through the outer doors without breaking: *Kerby v. Denbey*, 1 M. & W. 366; *Hutchinson v. Birch*, 4 Taunt. 619; even though the bailiff may have climbed over a wall into the yard of the house: *Long v. Clarke*, (1894) 1 Q.B. 119.

Ordinarily things upon the person cannot be taken as the doing so might involve a breach of the peace, but when the bailiff is acting under a writ of replevin an exception is established, and if the bailiff finds that any of the property to be replevied is concealed about the person or the premises of the defendant, or any other person holding the same for him he may, after demand and refusal of delivery, search the person and premises for the purpose of effecting the seizure: Rule 52; R.S.O. c. 66; but if the goods are in the possession of a person not holding them for the defendant, the writ will not justify the taking: *G. W. Ry. Co. v. McEwen*, 28 U.C.R. 528; *Hoorigan v. Driscoll*, 8 P.R. 181; *Steser v. Springer*, 7 A.R. 497. The outer door of a workshop or other building, not being a dwelling house or connected therewith, may be broken open without formal notice if the goods to be replevied are therein: *Hodder v. Williams*, (1895) 2 Q.B. 663.

Where the writ issues without an order the bailiff must take and detain the property until the order is obtained from the judge, and he may within fourteen days from the time of his taking the same re-deliver it to the defendant, unless, in the meantime, the plaintiff obtains and serves on the bailiff an order directing a different disposition of the property. This, however, is not applicable to a case of distress for rent

or damage feasant under rule 43 (3): Rule 50. In the latter case the bond takes the place of the goods which are held by the party distraining them merely to secure the rent or damages. The defendant should have notice of the application under this rule there being no urgency about obtaining the order.

Fees.—In regulating the fees on issuing a summons in replevin the value of the goods will be determined by the amount sworn to in the affidavit for the order or summons.

Service of the Writ.—A copy of the writ must be served on the defendant personally, or, if he cannot be found, by leaving it at his usual or last place of abode, with his wife or some grown person being a member of his household, or an inmate of the same place of abode: Rule 55.

As to service of summons: see notes to section 103.

The copy should not be served until the writ has been acted upon, and the property or some part of it replevied. If all the property is eloiigned, or cannot for any other reason be replevied, the writ is not to be served: Rule 56.

Substitutional Service.—If the writ cannot be served the judge may make an order for substitutional service: Section 104: Rule 57. See also rule 20 and notes to section 104.

Setting aside the Writ.—The defendant may, at any time, apply to the judge on an affidavit or otherwise to discharge, vary or modify the writ or order therefor, or to stay proceedings, or for any other relief as to the return, safety or sale of the property or any part thereof, or otherwise; and the judge may make such order thereon as, under all the circumstances, best consists with justice between the parties: Rule 58.

This rule enables the judge to preserve the property pending the litigation, or to sell the same. It removes any doubt which might exist as to the power of the judge to set aside his own order. If the possession of the property be specially valuable to the defendant, the judge might order its return to him pending the litigation upon his giving the plaintiff security. The question whether the defendant had, in fact, taken or detained the property cannot be dealt with on this motion. That is the question to be tried in the action; and the defendant's denial of such taking or detention is no ground for setting aside the writ or order: *Gilchrist v. Conger*, 11 U.C.R. 197.

The rule applies to an application on the merits and not for irregularity only; and where the writ was directed to a sheriff who was also sole liquidator of the plaintiffs and as such instituted the action, this was at most an irregularity and could not be taken advantage of after appearance had been entered (and perhaps not at all): *Alpha Oil Co. v. Donnelly*, 12 P.R. 515.

Return of the Writ.—The writ must be returned by the bailiff "at or before the return day thereof," and must contain the names, places of residence and calling of the sureties, the date of the bond and the names of the witnesses thereto, the number, quantity and quality of the articles replevied, and if only a part of it is replevied and the bailiff cannot replevy the rest he must state in his return the articles the bailiff cannot replevy and the reason why he cannot: Rule 53. For form of return see Form 67. Sheriffs and bailiffs should observe the necessity for their making a proper return to the writ: *Carveth v. Greenwood*, 3 P.R. 175.

It is a good return to say the cattle are dead or the goods destroyed by fire: *Morris*, 115.

For form of inventory of goods replevied see Form 68.

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In addition to the formal return to be made as above, the bailiff must give a correct and full statement of the particulars in detail of all his charges made for fees and disbursements in the execution of the writ: Rule 188.

Writ of Withernam.—If the property distrained has been eloigned—that is removed so that the bailiff cannot execute the writ—and the bailiff makes a return to that effect, on the filing of such return a writ in Withernam (a replevin of other goods in lieu of the goods originally replevied) shall be issued and on the issue of such writ the bailiff must again take security: Rule 54. For form of writ see Form 69. The provisions of Rule 49 do not apply.

Any goods of the defendant to the value of the goods eloigned may be taken by the bailiff, but the defendant by giving a bond with two sureties to answer to the plaintiff for the goods mentioned in the original writ, may regain possession of the goods seized in reprisal. In the High Court the plaintiff may, instead of proceeding in Withernam, receive damages for the goods eloigned: *Deal v. Potter*, 26 U.C.R. 578; *Graham v. O'Callaghan*, 14 A.R. 477; *Lewis v. Teak*, 32 U.C.R. 108; but under Rule 41, no other cause of action can be joined with replevin and it is doubtful whether the plaintiff could add to his claim a further claim for goods not replevied by the bailiff.

Parties.—All part owners must join in a replevin suit; neither a tenant-in-common, nor a joint-tenant, nor a partner can maintain replevin against a co-tenant or partner for taking the common property: *McNabb v. Howland*, 1 C.P. 434; *Ecclestone v. Jarvis*, 1 U.C.R. 370.

Judgment by Default.—Unless a defendant who has been served with the writ and particulars of claim leave with the clerk a notice disputing the plaintiff's claim within eight, ten or twelve days after the service, according to the return day of the writ, judgment may be entered by default in the same manner as if the defendant had appeared and had admitted the plaintiff's right to the possession of the goods: Rule 59. See notes to section 113. But the judge may, on sufficient grounds shown and on such terms as he thinks just, let the defendant in to defend: *Ib.* See notes to section 116.

When the plaintiff is entitled to judgment by default he may sign final judgment for \$2 and costs, but is not entitled to recover a larger sum except upon an assessment before a judge or a jury, or upon filing the written consent of the defendant or his solicitor, and an affidavit verifying the signature to such consent: Rule 60.

Payment into Court.—The defendant may, not less than six days before the day of trial, pay into court such sum as he thinks a full satisfaction for plaintiff's demand, together with costs up to the time of such payment: Rule 61. In such case the defendant should leave with the clerk a consent in writing to the delivery of the replevin bond to the plaintiff, and if the plaintiff accepts the money the proceedings shall be discontinued: Rule 62. The plaintiff should, on such payment being made into Court, observe the provisions of section 132 and of Rules 244 and 246.

Jury.—The right of trial by jury is now extended to actions of replevin where the value of the goods sought to be recovered exceeds \$20: Section 100, Rule 64.

Damages When Plaintiff Succeeds.—Where the goods are promptly recovered the damages are usually confined to the expenses of the replevin bond, because there is no other damage; but whatever damages have been actually sustained may be recovered, and cannot be recovered in a subsequent action: *Gibbs v. Cruickshank*, L.R. 8 C.P. 451; see *Stimson v. Block*, 11 O.R. 96.

As to damages on judgment by default see Rule 60.

In replevin, the jury may assess the damages as in trespass; and in an action arising out of wrongful distress for alleged arrears of rent damages are recoverable for the illegal distress and for annoyance and injury to credit and reputation in trade: *Smith v. Enright*, 69 L.T. 724. See note *infra* "Judgment and Execution."

Damages When Defendant Succeeds.—In replevin for goods not previously taken out of plaintiff's possession, and for which an action of trespass or trover might have been brought, the defendant, if he succeeds, shall be entitled to be indemnified against all damages sustained including costs, as between solicitor and client, incurred in the replevin suit: Rule 49: *Williams v. Crow*, 10 A.R. 301.

The damages which may be awarded, on the trial of the replevin suit, to the defendant, are not for the goods replevied or for the infringement of his rights thereto, but as a compensation for the expense and trouble he has undergone: *Pratt v. Rutledge*, 1 Salk. 95; see *Hawkins v. Eckles*, 2 B. & P. 359, 361 (a). The replevin bond affords an additional remedy to the defendant of which he may avail himself by action on the bond in case the condition of it is broken. See note *infra* "Action on Bond."

Judgment and Execution.—In replevin a verdict or judgment is divisible, so that the plaintiff may recover for whatever part of the goods he is entitled to, and the defendant for the rest: *Sills v. Hunt*, 16 U.C.R. 521; *Haggart v. Kernahan*, 17 U.C.R. 341; *Henderson v. Sills*, 8 C.P. 68; *Canniff v. Bogart*, 6 U.C.L.J. 59. In all cases of replevin except those arising out of a seizure under a distress, if the defendant justifies the taking and proves his case judgment must be for a return of the goods with or without costs, with such damages as the defendant shall have sustained if damages are awarded: Rule 67.

If damages are not awarded, the defendant could recover them in an action on the bond: *Williams v. Crow*, 10 A.R. 301. For form of judgment see Form 127.

If the action arises out of a distress for rent or any other distress which may be lawfully taken, and the defendant succeeds, he may, if he so require, have judgment for the value of the goods, if the value be less than the amount of rent or money in arrear, but if the amount of the rent or other sum in arrear be less than the value of the goods, judgment shall be given for the amount of such rent or other sum of money in the same manner as any other judgment: Rule 65. The defendant need not take advantage of this provision. It is discretionary with him: *Rees v. Morgan*, 3 T.R. 349; *Mayne on Damages*, 3rd ed. 374; but the defendant must show the amount of rent and the value of the goods distrained: *Sheape v. Cullpepper*, 1 Lev. 255. A landlord is entitled to get judgment against his tenant for his rent up to the value of the goods distrained without setting up a counterclaim. There must be a demise at a fixed rent: *Hayward v. Haswell*, 6 A. & E. 265; *Knight v. Bennett*, 3 Bing. 361. For form of judgment see Form 125.

Where goods levied under execution are replevied by the grantee of a judgment debtor under a bill of sale, the sheriff may put in a claim of special property: *Lyman v. Sheriff*, 9 C.L.T. 289.

A stranger whose goods have been distrained for rent on the premises of a tenant, cannot, in replevin, any more than the tenant, question the landlord's right to demise: *Smith v. Aubray*, 7 U.C.R. 90.

Where the distress is for damage feasant, and the defendant is entitled to judgment for a return, if the plaintiff so require, the judge or jury may find the amount of damages sustained, and judgment shall be in the alternative for a return or for the amount of the damage so found: Rule 66. For form of judgment see Form 126.

If the distress proves wrongful, the damages assessed may include the cost of the replevin bond and such consequential or special damages as

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have been proved, as for instance, injury to the property during its detention or by its removal, and loss to the plaintiff by being deprived of its use: *Gibbs v. Cruickshanks*, L.R. 8 C.P. 454; *Smith v. Enright*, 69 L.T. 724. In the latter case the damages included illegal distress, cost of replevying, solicitors' charges in and about replevying, loss from stoppage of and interference with business, damage for annoyance and injury to credit and reputation in trade. The county court judge held that the first and last items could not legally be allowed. But on appeal his decision was reversed, the court remarking that "It is clear that in an action of replevin a jury may assess damages in the same way that they may in an action of trespass. . . . Those items (*i.e.*, for alleged distress and for annoyance and loss of reputation in trade) are both in point of law recoverable in the present action. *Gibbs v. Cruickshanks*, L.R. 8 C.P. 454, covers the first item, and *Brewer v. Dew*, 11 M. & W. 625, is equally in point as to the damage claimed by the last item."

Where goods are seized upon a search warrant under the Canada Temperance Act, a judgment on *certiorari* quashing the warrant will not estop defendant in a replevin suit from justifying under the warrant where he was not a party to the proceedings to quash it: such a judgment being a judgment *inter partes* only: *Sleeth v. Hurlbert*, 25 S.C.R. 620. See notes *infra* on Replevin Bond.

Replevin Bond.—For form of bond see Rule 47 and Forms 65 and 66. The bond should not be in the disjunctive, but should be conditioned to prosecute the suit with effect and return the goods, etc.: *Kemlin v. Macdonald*, 22 O.R. 484. See note *supra*, "Security."

There may be more than two sureties in the bond, even where the statute says there may be two: *Meyers v. Mabey*, 10 U.C.R. 200; *Bacon v. Langton*, 9 C.P. 410; *Becker v. Ball*, 18 U.C.R. 192; *Bates v. Mackey*, 1 O.R. 34.

The bond may be attested by only one witness, but a subscribing witness is required: *Henry v. Cousins*, 34 U.C.R. 63.

A bailiff is bound to inquire into the sufficiency of the pledges or sureties in the bond: *Hunter v. Blades*, 5 Taunt. 225; *Norman v. Hope*, 14 O.R. 287; *Horsfall v. Sutherland*, 31 N.S.R. 471.

A bond though irregular, as taken to the judge, may be good as a voluntary bond: *Stansfield v. Hellawell*, 7 Ex. 373; and would be enforceable by the bailiff, who would stand as a trustee for the defendant: *Id.*

The defendant is entitled to see the bond before he takes a step in the cause: *Logue v. Prescott*, 18 C.L.T. 186.

If the bailiff fails to take the necessary bond before seizure, the seizure will be set aside with costs, to be paid up by the bailiff: *Lawless v. Radford*, 9 P.R. 33. See *Bates v. Mackey*, 1 O.R. 34. The amount of damages against a bailiff for taking an insufficient bond could not exceed the penalty of the bond: *Norman v. Hope*, 13 O.R. 556; 14 O.R. 287. See also *Jeffery v. Bastard*, 4 A. & E. 823.

A coroner acting in the place of a sheriff is subject to all the common law and statutory liabilities as well as the rights of the office of sheriff, and is personally responsible for taking insufficient security: *Horsfall v. Sutherland*, 31 N.S.R. 471.

Assignment of Bond.—The bond is assignable to the defendant: Rule 47; and an action will lie against the bailiff for refusal to assign it: *Pacand v. McEwan*, 31 U.C.R. 328. For form of assignment see Form 66.

The bond cannot be assigned while the suit is pending: *Becker v. Ball*, 18 U.C.R. 192. It is assignable when the court in which the action was brought refused to try the case for want of jurisdiction: *Welsh v. O'Brien*, 28 U.C.R. 405.

Action on Bond.—If the plaintiff does not prosecute his suit with effect and without delay, the defendant may take an assignment of the bond from the bailiff and sue it in his own name: *Bacon v. Langton*, 9 C.P. 410; *Becker v. Ball*, 18 U.C.R. 192; *Welsh v. O'Brien*, 28 U.C.R. 405; *Mulvaney v. Hopkins*, 18 U.C.R. 174; *Johnson v. Parke*, 12 C.P. 179; *Meloche v. Reaume*, 34 U.C.R. 606; *Culham v. Love*, 30 U.C.R. 410; *Caswell v. Catton*, 9 U.C.R. 282, 462; *Bletcher v. Burn*, 24 U.C.R. 250; *Meyers v. Baker*, 26 U.C.R. 16; *Golding v. Belnap*, 26 U.C.R. 163; *Patterson v. Fuller*, 31 U.C.R. 323; *McKelvey v. McLenn*, 34 U.C.R. 635; *Mulvaney v. Hopkins*, 18 U.C.R. 174; and also where the writ and subsequent proceedings are set aside: *Meloche v. Reaume*, 34 U.C.R. 606.

The bond may be sued in the Division Court, no matter how large the penalty may be: section 274; *Exchange Bank v. Springer*, 13 A.R. 390. But no more than the amount of the penalty can be recovered: *Ab. McMahon v. Ingersoll*, 6 O.S. 301; *Randall v. Burton*, 4 P.R. 9; *Hatton v. Harris*, (1892) A.C. 547.

If the plaintiff prosecute his suit with effect and without delay, there is no action on the bond: *Caswell v. Catton*, 9 U.C.R. 382; but the inability of the plaintiff's solicitor to communicate with his client will not prevent a forfeiture of the bond: *Bletcher v. Burn*, 24 U.C.R. 124.

To prosecute "with effect" the plaintiff must bring the action to a termination which is not an unsuccessful one: *Jackson v. Hanson*, 8 M. & W. 477; *Tummons v. Ogle*, 6 E. & B. 571.

But want of due diligence may, if the defendant in replevin is prejudiced by the delay, constitute a breach of the condition: *Gent v. Cutts*, 11 Q.B. 288; *Harrison v. Wardle*, 5 B. & A. 154; and when two years had been permitted to elapse without any steps being taken in the replevin suit, the bond was forfeited; and in such case the obligee could recover, although judgment has not been signed: *Axford v. Perrett*, 4 Bing. 586. See also *Morris v. Matthews*, 2 Q.B. 293; *Evans v. Bowen*, 19 L.J.Q.B. 8.

Defences in action on bond.—The bond is subject to the provisions of section 8 of 8 and 9 William III., c. 11. (Rule 48) by which it is enacted: "That in all actions which, from and after the said 25th day of March, 1697, shall be commenced or prosecuted in any of His Majesty's Courts of Record, upon any bond or bonds, or on any penal sum, for non-performance of any covenants or agreements in any indenture, deed, or writing contained, the plaintiff or plaintiffs may assign as many breaches as he or they shall think fit, and the jury, upon the trial of such action or actions, shall and may assess not only such damages and costs of suit as have heretofore been usually done in such cases, but also damages for such of the said breaches so as to be assigned as the plaintiffs upon the trial of the issue shall prove to have been broken, and that the like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions; and if judgment shall be given for the plaintiff on a demurrer, or by confession, or *nihil dicit*, the plaintiff upon the roll may suggest as many breaches of the covenants and agreements as he shall think fit, upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justice or justices of the assize, or *nisi prius*, of that county, to enquire of the truth of every one of those breaches and to assess the damages that the plaintiff shall have sustained thereby; in which writ it shall be commanded of the said justice or justices of assize, or *nisi prius*, that he or they shall make a return thereof to the court from whence the same shall issue at the time in such writ mentioned; and in case the defendant or defendants, after such judgment entered, and before any execution executed, shall pay unto the court where the action shall be brought, to the use of the plaintiff or plaintiffs, or his or their executors or administrators, such damages so to be assessed by reason of all or any of the

breaches of such covenants, together with the costs of suit, a stay of execution of the said judgment shall be entered upon the record; or if by reason of any execution executed, the plaintiff or plaintiffs, or his or their executors or administrators, shall be fully paid or satisfied, all such damages so to be assessed, together with his or their cost of suit, and all reasonable charges and expenses for executing the said executions, the body, lands, or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but notwithstanding in each case such judgment shall remain, continue, and be as a further security to answer to the plaintiff or plaintiffs and his or their executors or administrators such damages as shall or may be sustained for further breach of any covenant or covenants in the same indenture, Deed, or writing contained, upon which the plaintiff or plaintiffs may have a *scire facias* upon the said judgment against the defendant, or against his heir, *terre tenants*, or his executors or administrators, suggesting other breaches of the said covenants or agreements, and to summon him or them respectively to show cause why execution should not be had or awarded upon the said judgment, upon which there shall be the like proceedings as was in the action of debt upon the said bond or obligation for assessment of damages upon the trial of issue joined upon said breaches or enquiry thereof upon the writ to be awarded in manner as aforesaid; and that upon payment or satisfaction in manner as aforesaid of such future damages, costs, and charges as aforesaid, all further proceedings on the said judgment are again to be stayed, and so *toties quoties*, and the defendant, his body, lands, or goods, shall be discharged out of execution as aforesaid."

Before the Act of 8 & 9 W. 3, the practice was to enter judgment for the penalty, one shilling damages and forty shillings costs. The penalty is still the debt: *Talbot v. Hodson*, 7 Taunt. 251. The plaintiff may, if he please, state the condition of the bond in his statement of claim and assign several breaches, whereas at common law he could only assign one, or he may declare on the bond generally, in which case, if the defendant suffer judgment by default, or the plaintiff obtain judgment by demurrer, the plaintiff may enter a suggestion. If before the statute the defendant had pleaded a plea on which the plaintiff might have taken an issue in his replication without assigning a breach of the condition of the bond, as, for instance, that he did not execute the bond (*non est factum*), or that he was released, or that performance was excused, or rendered impossible by the act of the obligee, or was made illegal, the plaintiff might take issue, and, if successful on the issue, would be entitled to judgment for the penalty. But if defendant pleaded performance, and the plaintiff had not assigned breaches in his declaration, he was bound to assign one in his replication, and, if successful therein, he would be entitled to judgment for the penalty. Since the statute, the plaintiff is bound to assign breaches only when defendant pleads performance. This he may do either in his statement of claim or reply. If defendant sets up a defence under which at common law the plaintiff might take issue without assigning a breach, the plaintiff may still take issue thereon, and upon success therein he would be entitled to judgment, but would be unable to assess damages until he had suggested breaches as required by the statute: See *Star Life Assce. Society v. Southgate*, 18 P.R. 151; 2 Wms. Samd. 187 (b); *Meredith v. Alleyn*, 1 Salk 138; *Cowan v. White*, 9 U.C.L.J. 131. If performance is pleaded as to part and excused as to remainder, and the plaintiff has not assigned breaches in the statement of claim, he must assign breaches as to the part alleged to be performed, and if excuse traversed must suggest breaches, and in event of excuse being found against defendant damages will be assessed on suggestion; *Webb v. James*, 8 M. & W. 645; see *Ethersey v. Jackson*, 8 T.R. 255; *Humfray v. Rigby*, 5 M. & S. 60.

If breaches are not assigned in the statement of claim or reply, a verdict for the penalty may be set aside; Brock District Council v. Bowen, 7 U.C.R. 471. Judgment cannot be signed by default in an action on a bond within the statute; Buell v. Whitney, 11 C.P. 240; nor can speedy judgment be granted under section 111; Tather v. Carlampi, 21 Q.B.D. 414; Star Life Assce. Society v. Southgate, 18 P.R. 151.

As the cause of action is the penalty, if payment be made after action on a bond of the amount then due, the plaintiff must, if any further damages would be recoverable for future breaches, proceed with the action, or the defence of payment would be a bar to a second action; Randall v. Burton, 23 U.C.R. 268.

The defendant cannot plead to the breaches suggested: Archbishop of Canterbury v. Robertson, 1 C. & M. 690.

It is no answer to an action on the bond to say that a return was made according to the condition but the plaintiff refused to accept it. It only answers one breach; Goulding v. Belnap, 26 U.C.R. 163; see Kennin v. Maedonald, 22 O.R. 484.

Where a sheriff seized goods claimed by a third party under a chattel mortgage, but none of the goods were removed by the sheriff and no one was left in charge and no act of any kind done indicating continuance of possession on the part of the sheriff, and the goods remained in the possession of the claimant, an action of replevin for their recovery could not be sustained; the right of the sheriff to seize and sell the equity of redemption being clear the claimant was not damaged by the mere advertising of the goods for sale, and no action would lie for an intention not carried into effect; and the sheriff could justify on any valid ground existing at the time of the levy; Gates v. Bent, 31 N.S.R. 544.

Set-Off.—A set-off may be pleaded to an action by the assignee of the bond: McKelvey v. McLean, 34 U.C.R. 625; also payment into court: Thompson v. Kaye, 13 C.P. 251.

Staying Proceedings.—The court has always power, which it will exercise to stay proceedings on a replevin bond when it would be equitable and just to do so: Bates v. Mackay, 1 O.R. 34; see also Ruttan v. Short, 12 U.C.R. 485; Hendley v. Closter, 13 U.C.R. 333. But it has been said that courts are averse to staying proceedings and prefer leaving the question of damages to be tried in the ordinary way: Hoover v. Zavits, T.T. 1 & 2 Vic.; Culham v. Love, and Love v. Culham, 30 U.C.R. 410; Meyers v. Baker, Hargreaves v. Meyers, 26 U.C.R. 16; Meloche v. Reaume, 34 U.C.R. 606; Johnson v. Parker, 12 C.P. 179. But if the plaintiff in replevin be hindered from prosecuting the suit with effect by the default of the defendant in replevin the court will prevent the latter from proceedings on the bond: Evans v. Bowen, 19 L.J.Q.B. 8.

Damages in Action on Bond.—See Rule 49, *ante* p. 91.

The words "as heretofore in that behalf" in rule 49 mean before 30th March, 1885, the date when the statute from which the rule is taken was enacted by 48 Vic. c. 13, p. 8.

The actual damage is all that can be recovered: Heley v. Cousins, 34 U.C.R. 63; Kennin v. Maedonald, 22 O.R. 484.

On judgment for plaintiff for part and a return of the rest, the plaintiff in replevin is liable for not prosecuting the suit with effect as to the goods for which he failed and for not returning them: Patterson v. Fuller, 31 U.C.R. 323.

The defendant in replevin can claim damages in an action on the bond though not awarded in the replevin suit: Williams v. Crow, 10 A.R. 301.

See note *infra* "Liability of Sureties."

Liability of Sureties.—The two sureties in a replevin bond are together liable only to the amount of the penalty in the bond, and the costs of suit on the bond: *Hefford v. Alger*, 1 Taunt. 218.

In replevin for distress for rent they are only liable for the value of the goods seized, and if the value exceeds the rent they are only liable for the rent: *Hunt v. Round*, 2 Dowl. 558.

Release of Sureties.—A release by plaintiff to one of several obligors in a replevin bond, after assignment by the bailiff to him would release all the sureties and preclude the bailiff from suing the bailiff for taking insufficient security: *Kirkendall v. Thomas*, 7 U.C.R. 30; and a reference of the suit to arbitration, without the assent of a surety, would discharge him: *Archer v. Harte*, 4 Bing. 464; *Hutt v. Gilleland*, *Hutt v. Keith*, 1 U.C.R. 540; nor will the attendance of the sureties on an arbitration imply consent to the reference: *Burke v. Glover*, 21 U.C.R. 294; see 10 U.C.L.J. 169; and a postponement of the trial without the direct consent or concurrence of the sureties discharges them: *Canniff v. Bogart*, 6 C.P. 474; but not if the trial is postponed without plaintiffs' concurrence: *O'Connell v. Duchennault*, 14 O.R. 1.

Enlarging the time for making an award does not discharge the sureties: *Aldridge v. Harper*, 10 Bing. 118.

13. Except in cases in which a Jury is legally demanded by a party as hereinafter provided, the Judge shall hear and determine in a summary way all questions of law and fact, and may make such orders or judgments as appear to him just and agreeable to equity and good conscience, which shall be final and conclusive between the parties, except as herein otherwise provided. R.S.O. 1887, c. 51, s. 70 (1) part.

Judge to try.

Orders Agreeable to Equity and Good Conscience.—This expressly authorizes a judge to do what he, as an arbitrator, may consider just, and does not bind him to observe technical rules either of law or equity. The provision, however, adds nothing to the practical effect of unappealable cases in which his decision, no matter how wrong it may be in point of law, cannot be reviewed: see *ante*, p. 66, notes on Prohibition; *Home v. Camden*, 2 H. Bl. 536; *Re Dyer v. Evans*, 30 O.R. 637; see *Ex parte Moses*, *Moses v. Parker*, (1896) A.C. 245; *Brown v. Mitchell*, 7 U.C.L.J. 298.

In appealable cases it would, doubtless, be found that a decision erroneous in point of law, but founded on the views of a Division Court judge as to equity and good conscience, would be corrected. The provision was referred to by *Boyd, C.*, in *Legarie v. Canada Loan and Banking Co.*, 11 P.R. 512; see *Re McGibbon v. Eager*, 18 C.L.T. 311; *Foster v. Reeves*, (1892) 2 Q.B. 255; *Crayston v. The Massey-Harris Co.*, 12 Man. L.R. 163.

14. Upon any contract for the payment of a sum certain in labour or in any kind of goods or commodities or in any other manner than in money, the Judge, after the day has passed on which the goods or commodities ought to have been delivered or the labour or other thing performed, may give judgment for the amount in money as if the contract had been originally so expressed. R.S.O. 1887, c. 51, s. 71.

Judge may order payment in money, although contract not for payment in money.

Payment Otherwise than in Money.—Agreements are sometimes entered into for payment of a certain sum in some designated commodity. In this section such a transaction appears to be placed upon the same basis as a liability upon a promissory note, and the judge is empowered to give judgment as if the contract had originally been payable in money. A demand is usually not necessary on the part of the plaintiff before suit, it being incumbent on the defendant to offer to perform the work or otherwise fulfil his promise: *Teal v. Clarkson*, 4 O.S. 372; *Jones v. Gibbons*, 8 Ex. 920; *Crabtree v. Messersmith*, 19 Iowa, R. 179.

Should the contract be to deliver wheat F.O.B., it would be the duty of the buyer to provide the cars for the shipment, and if not done, there would be no breach: *Marshall v. Jamieson*, 42 U.C.R. 115. The right of action would be assignable: R.S.O. c. 51 s. 58 (5).

Powers of
courts.

75. Every Division Court shall as regards all causes of action within its jurisdiction for the time being, have power to grant and shall grant in any proceeding before such Court such relief, redress, or remedy, or combination of remedies, either absolute or conditional, including the power to relieve against penalties and forfeitures, and shall in every such proceeding give such and the like effect to every ground of defence or counter-claim, equitable or legal (subject to the provision next hereinafter contained), in as full and ample a manner as might and ought to be done in the like case by the High Court. R.S.O. 1887, c. 51, s. 73; 60 V. c. 3, s. 3; c. 15, Sched. A (64).

[(2) Nothing in this section shall confer or be deemed to have conferred on a Division Court jurisdiction to grant injunctions in cases otherwise within the competency of the Court.] 61 V. c. 15, s. 1.

Equitable Jurisdiction.—This section directs the judge of a Division Court in every proceeding before him within his jurisdiction to grant the same relief, redress and remedy and combination of remedies, and to give effect to the same defences, equitable and legal as if the action were in the High Court; and, therefore, it was thought, that in any case within the jurisdiction of the court, the judge of a Division Court could deal with it in the same manner as a judge of the High Court might in an action in that court. In *Ex parte Martin*, 4 Q.B.D. 212; S.C., *sub nom Martin v. Bannister*, 4 Q.B.D. 491, it was held that the section gave power to an inferior court, having no wider jurisdiction in this respect than our Division Courts, to grant an injunction in an action within its jurisdiction and to commit for disobedience thereof. And in *Richards v. Cullerne*, 7 Q.B.D. 323, the right under this section was held to extend to all orders, whether final or interlocutory. *Jesset*, M.R. said: "The section applies in every case where, if the action were in the High Court, a party could be committed for disobedience." *Brett*, L.J., said: "The County Court then has the same power as the High Court at every stage." But by the Act of 61 Vic. c. 15, section 1, (sub-section 2 *supra*) it is declared that the jurisdiction of Division Courts shall not extend to the granting of an injunction in cases otherwise within the jurisdiction of the court. Since the amendment of 1898 it is more difficult to state the effect of the section. The following provisions of the Judicature Act, R.S.O. c. 51, are material.

57 (3) (Subject to appeal as in other cases) the High Court shall have power to relieve against all penalties and forfeitures, and in granting such relief to impose such terms as to costs, expenses, damages, compensation and all other matters as the court thinks fit.

57 (6) "If any defendant claims to be entitled to any equitable estate or right, or to relief upon any equitable ground against any deed, instrument, or contract, or against any right, title, or claim asserted by any plaintiff or petitioner in such cause or matter, or alleges any ground of equitable defence to any claim of the plaintiff or petitioner in such cause or matter, the said courts respectively, and every judge thereof, shall give to every equitable estate, right, or ground of relief so claimed, and to every equitable defence so alleged, such and the same effect, by way of defence against the claim of such plaintiff or petitioner, as the Court of Chancery ought to have given if the same or the like matters had been relied on by way of defence in any suit or proceeding instituted in that court for the same or the like purpose before the passing of *The Ontario Judicature Act, 1881*."

57 (7) "The said courts respectively, and every judge thereof shall also have power to grant to any defendant in respect of any equitable estate or right, or other matter of equity, and also in respect of any legal estate, right or title claimed or asserted by him, all such relief against any plaintiff or petitioner as such defendant shall have properly claimed by his pleading, and as the said courts respectively, or any judge thereof, might have granted in any suit instituted for that purpose by the same defendant against the same plaintiff or petitioner; and also all such relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether already a party to the same cause or matter or not, who shall have been duly served with notice in writing of such claim pursuant to any rule of court or any order of the court, as might properly have been granted against such person if he had been made a defendant to a cause duly instituted by the same defendant for the like purpose; and every person served with any such notice shall thenceforth be deemed a party to such cause or matter, with the same rights in respect of his defence against such claim as if he had been duly sued in the ordinary way by such defendant."

57 (8) "The said courts respectively, and every judge thereof, shall recognize and take notice of all equitable estates, titles and rights, and all equitable duties and liabilities appearing incidentally in the course of any cause or matter, in the same manner in which the Court of Chancery would have recognized and taken notice of the same in any suit or proceeding duly instituted therein before the passing of this Act."

57 (10) "If any action is brought in the High Court for any cause of action for which any suit or action has been brought and is pending between the same parties or their representatives in any place or country out of Ontario, the court or any judge thereof may make an order to stay all proceedings in the High Court until satisfactory proof is offered to the court or judge that the suit or act on so brought in such other place or country out of Ontario is determined or discontinued."

57 (11) "Subject to the aforesaid provisions for giving effect to equitable rights and other matters of equity in manner aforesaid, and the other express provisions of this Act, the said courts respectively, and every judge thereof, shall recognize and give effect to all legal claims and demands, and all estates, rights, duties, obligations and liabilities existing by the common law or created by any statute, in the same manner as the same would have been recognized and given effect to prior to *The Ontario Judicature Act, 1881*, by any of the courts then existing and whose jurisdiction is now vested in the High Court."

58 (7) "Stipulations in contracts, as to time or otherwise, which would not before the passing of *The Ontario Judicature Act, 1881*, have been deemed to be or to have become of the essence of such contracts in a Court of Equity, shall receive in all courts the same construction and effect as they would, prior to the passing of said Act, have received in equity."

Equitable Relief.—It is clear that an action cannot be maintained for purely equitable relief, e.g., for specific performance: *Foster v. Reeves*, (1892) 2 Q.D. 255; or for reformation of an instrument: *Crayston v. Massey-Harris Co.*, 12 Man. L.R. 165; or to declare the right to rank upon an insolvent estate: *Whidden v. Jackson*, 18 A.R. 440. The same cases also establish that where equitable relief is necessary as a condition precedent to the right to recover money, e.g., rent, or a dividend, the Division Court has no jurisdiction to entertain the action for the money demand. In short, the right of the plaintiff must be one which, before the fusion of law and equity, would have been recognized in a court of law. An action may, however, be maintained for a sum of money held by the defendant in trust for the plaintiff, such as the surplus proceeds of property sold under the power of sale in a mortgage: *Legarie v. Canada Loan and Banking Co.*, 11 P.R. 512; or for interest received by the defendant upon moneys invested by him for the plaintiff's benefit: *Re McGibbon v. Eager*, 18 C.L.T. 311. These are equitable causes of action for money had and received. If a plaintiff is entitled to possession of goods, though his title be merely equitable, he may, as we have seen, maintain an action of replevin: *Carter v. Long*, 26 S.C.R. 430; *Connell v. Hickcock*, 15 A.R. 518.

If, however, the plaintiff has a cause of action which would have been cognizable in a court of law, and the amount is within the jurisdiction of a Division Court, he will be entitled to obtain from that court not only the remedies which were awarded by a court of law, viz., judgment for the amount and execution therefor, but also any additional remedies, other than an injunction, which he might have obtained in the Court of Chancery in aid of the legal right established by his judgment at law: *Martin v. Bannister*, 1 Q.B.D. 491; *Fitchett v. Mellow*, 18 P.R. 161. Now that the right to grant injunctions has been declared not to exist, the section adds little or nothing to the powers of the court to award any "relief, redress, remedy, or combination of remedies," to a plaintiff.

The section confers plenary powers upon the courts to allow a defendant to defeat the plaintiff's claim by a defence which could not have been raised or would not have been effectual in a court of law. It was formerly necessary where a person had a good equitable, but no legal defence to a claim, to commence an action in the Court of Chancery to restrain the plaintiff from prosecuting the action at law. This is now unnecessary. So, where a defendant was sued for a penalty or forfeiture, it was necessary for him to file a bill in Chancery to be relieved therefrom. The Division Courts may now in such a case grant the relief. Every ground of defence, equitable or legal, and every cross-claim, either for legal or equitable relief, which will have the effect, if successful, of defeating the plaintiff's recovery, in whole or in part, must be given effect to in actions in the Division Court.

Procedure.—Only the abstract rights and powers of the High Court are conferred. "The power given to the inferior court is that in any action before such court it may give the same relief, redress or remedy which would be given in a similar action in the Superior Court. It gives to the inferior court authority to grant the same relief, redress or remedy as the result of the action, but it does not give such court the same power, as the Judges of the Superior Court have, to arrive at the granting of such relief, redress or remedy": *per Brett, M.R.*, 10 Q.B.D.

508. The rules of the High Court are not, therefore, applicable to Division Courts. These courts must proceed with their own machinery and under rules framed by the Board of County Judges, except that the "principles of practice" of the High Court may be applied under section 312.

In *Pryor v. City Offices Co.*, 10 Q.B.D. 504, it was held that the Judge of an inferior court had not the power of the High Court, on a motion for a new trial, to direct judgment for either party, the inferior court having no such express power as is conferred upon our Division Courts by section 152 (2).

A nonsuit has not the effect of preventing the plaintiff from bringing a fresh action, notwithstanding the rule of the High Court giving that effect to such a judgment in the High Court cases: *Building and Loan Ass'n. v. Heimrod*, 19 C.L.J. 254; *Bank of Ottawa v. McLaughlin*, 8 A.R. 543. "The rule of the High Court is a rule of procedure applying only to the courts to which it is in terms made applicable." *Per Spragge, C.J.O.* The Rules of the High Court as to the service on partners do not apply to the Division Courts: *Clarke v. McDonald*, 4 O.R. 310; see also *Guy v. G. T. Ry. Co.* 10 P.R. 374. In two Division Court cases the rules of the High Court authorizing speedy judgment were acted upon, but it may be doubted, in view of the careful analysis the section has undergone in the English Court of Appeal, whether these cases were correctly decided: *Smith v. Lawlor*, 19 C.L.J. 258; *Connors v. Birmingham*, 20 C.L.J. 10. See also *Willing v. Elliott*, 37 U.C.R. 320, (1876) where it was held that the procedure of the High Court as to discovery was not applicable to Division Courts: and see also *Wood v. Leetham*, 61 L.J.Q.B. 215.

Relief Against Penalties and Forfeitures.—Formerly the section included in its provisions the power to grant relief against penalties, forfeitures and "agreements for liquidated damages," but in the revision of the statutes in 1897, the latter clause was omitted and the power to deal with agreements for unliquidated damages was taken away. The right of the Division Court to relieve against penalties and forfeitures was first given in 1886. It was then subject to appeal. Upon the revision of the statutes in 1887 this restriction disappeared and the right of appeal is governed as in other cases by section 154 and R.S.O. c. 51, s. 75. Since S & 9 Wm. III. c. 11 *ante*, p. 102, a penalty on a contract has been irrecoverable and the right has been restricted to actual damages. The contest since that time has principally been, whether a sum mentioned as payable on non-performance of a contract was a penalty or a sum payable as liquidated damages.

The following rules have been established:—

1. Where any one of the stipulations is for payment of money, the court will not sever the stipulations, but will hold the sum to be a penalty: *Astley v. Weldon*, 2 B. & P. 346; *Kemble v. Farren*, 6 Bing. 141, 31 R.R. 366; *Re Newman*, 4 Ch.D. 724.

2. Where one lump sum is made payable by way of compensation on the occurrence of one or all of several events, some serious and some trifling, the same is a penalty: *Magee v. Lavell*, L.R. 9 C.P. 107; *Elphinstone v. Monkland Iron and Coal Co.*, 11 App. Cas. 332; or where there is a substantial difference in value between two things, for the omission of either of which the same sum is to be paid: *Willson v. Love*, (1896) 1 Q.B. 626.

3. But where the sum is payable on a single event only, not being the non-payment of money, or where the damages for the breach of each stipulation are unascertainable, or not readily ascertainable, and there is no substantial difference between them, the amount will be treated as liquidated damages: *Craig v. Dillon*, 6 A.R. 116; *Wallis v. Smith*, 21

Ch.D. 243; *Schrader v. Lillis*, 10 O.R. 358; *Law v. Local Board of Red-ditch*, (1892) 1 Q.B. 127, and the rule is the same though the contract describes the amount as a penalty: *Chatterton v. Crothers*, 9 O.R. 683.

4. Where a deposit is to be forfeited for a breach of a number of stipulations, although some may be trifling, the contract of the parties must be carried out: *Wallis v. Smith*, 21 Ch.D. 258; *Howe v. Smith*, 27 Ch.D. 89.

Counterclaim.—A defendant may set up by way of counterclaim, against the claim of the plaintiff, any right or claim whether the same sound in damages or not: Rule 105. What is really a set off—that is, a debt due by the plaintiff to the defendant for which the defendant might have maintained an action at the time the plaintiff commenced his action, should be relied upon as such: *Cutler v. Morse*, 12 P.R. 594. "Before the Judicature Acts, a person having a cross-claim must have raised it by cross-action, but these Acts have given a right to counterclaim. In some of the cases language has been used which would seem to imply that a counterclaim is sometimes in the nature of a set-off and sometimes not. No doubt matter is occasionally pleaded as counterclaim which is really set-off, but counterclaim is really in the nature of a cross-action. The court has determined that where there is a counterclaim, in settling the rights of parties, the claim and counterclaim are for all purposes, except execution, two independent actions," *per* Lord Esher, M.R., *Stumore v. Campbell*, (1892) 1 Q.B. 316.

Where two or more plaintiffs sue for a joint claim, the defendant may set up a separate counterclaim sounding in damages against each or either of them: *Manchester S. & L. Ry. Co. v. Brooks*, 2 Ex.D. 145.

If the debt arose after the issue of the summons, it must be set up by way of counterclaim: *Chamberlain v. Chamberlain*, 11 P.R. 501; see *Beddall v. Maitland*, 17 Ch.D. 174.

A defendant can only set up by way of counterclaim or set-off a demand for which he can bring an action. Therefore a cause of action which arose out of the jurisdiction cannot be set up by way of counterclaim or set-off unless the circumstances be such as to permit of an action being brought upon it: *Canadian Bank of Commerce v. Northwood*, 8 C.L.T. 356; 5 Man. L.R. 342.

It is not essential that the amount claimed by the counterclaim should equal that claimed by the plaintiff: *Mostyn v. West Mostyn Coal and Iron Co.*, 1 C.P.D. 145.

A claim which the Court of Chancery would, before the Judicature Act, have restrained a defendant from pleading as a set-off, cannot be set up as a counterclaim: *Newell v. Nat. Pro. Bank of England*, 1 C.P.D. 496.

Where a claim and counterclaim arise out of different matters, so that the counterclaim is really in the nature of a cross-action, the defendant, if he is residing out of the jurisdiction, may be required to give security for the plaintiff's costs of the counterclaim, and if the only dispute remaining arise on the counterclaim, it is only right that he should be so required: *Sykes v. Sacerdoti*, 15 Q.B.D. 423.

A counterclaim need not arise out of the same subject as the cause of action. There can be a counterclaim for an entirely different subject as between the parties to the action themselves: *Brown v. Nelson*, 11 P.R. 121; *McLean v. Hamilton St. Ry. Co.*, 11 P.R. 193.

A defendant cannot obtain judgment on his counterclaim until the plaintiff's claim is tried: *Aitkin v. Dunbar*, 46 L.J. Ch. 489; *Greer v. Hunter*, 11 C.L.T. 281; see *Roberts v. Booth*, (1893) 1 Ch. 52.

A plaintiff cannot discontinue his action after a counterclaim has been delivered so as to prevent defendant from enforcing the cause of action

contained in the counterclaim: *McGowan v. Middleton*, 11 Q.B.D. 464, overruling *Vavasour v. Krupp*, 15 Ch.D. 474; Rule 111; but *quære*, as to an action in the Division Court, if the counterclaim should be beyond the court's jurisdiction?

A counterclaim upon which no relief is given can make no difference to the jurisdiction: *Fitchett v. Mellow*, 18 P.R. 161.

The courts will give effect to equitable rights, though not set up by way of counterclaim: *Mostyn v. West Mostyn Coal and Iron Co.*, 1 C.P.D. 145; *Eyre v. Hughes*, 2 Ch. D. 148; *Breslauer v. Barwick*, 36 L.T. 52.

Counterclaims have been allowed against assignees of choses in action in the following cases: Claim of breach of same contract: *Young v. Kitchin*, 3 Ex. D. 127; *Exchange Bank v. Stinson*, 32 C.P. 158; *Government of Newfoundland v. Newfoundland Ry. Co.*, 13 App. Cas. 199, see page 213, where it is said: "Unliquidated damages may be set off as between the original parties and also against an assignee, if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment. See also *Irving v. Morrison*, 27 C.P. 242; *Henderson v. Brown*, 18 Gr. 86; *Williams v. Sibley*, 4 Giff. 142; *Gould v. Close*, 21 Gr. 275; *Cavendish v. Geaves*, 24 Beav. 163; *Re West of England and S. W. Dist. Bank. Ex parte Branwhite*, 40 L.T. 652; *Re National Alliance Co.*, *Ashworth's Case*, 7 L.T. 64; *Greene v. Harris*, 16 S.C.R. 714.

In an action for rent, a claim for damages for breach of an implied covenant in the lease, may be set up by way of counterclaim: *Mostyn v. West Mostyn Coal & Iron Co.*, 1 C.P.D. 145.

A person named in a defence as party to a counterclaim cannot counterclaim against the defendant: *Street v. Glover*, 2 Q.B.D. 498.

It is optional with a defendant to set up a counterclaim, and his not doing so does not bar his right to take any other proceedings: *Hindlay v. Haslam*, 3 Q.B.D. 481.

A defendant must not bring a third party before the court as defendant to a counterclaim against the plaintiff, unless the relief to be obtained against him relates specifically to, or is connected with the subject matter of the action: *Padwick v. Scott*, 2 Ch. D. 736.

Where a defendant delivered a counterclaim against his co-defendant but sought no relief against the plaintiff as to the matters set up in such counterclaim and the counterclaim was struck out at the trial, the co-defendant was held to be entitled to the same costs as against the counterclaiming defendant as he would have been entitled to upon a successful motion to strike out the counterclaim and that his having pleaded to it did not militate against his rights: *Cope v. Crichton*, 18 P.R. 462.

In an action on a mortgage given for the balance of purchase money of land, the defendant may counterclaim, setting up fraud in the transaction, and seeking a return of the money paid, with interest: *Lee v. McMahon*, 2 O.R. 654; see also *Bartholemew v. Rawlings*, W.N. (1876) 56.

In an action for wages, the master may counterclaim for damages sustained by reason of the servant's improperly leaving his employment: *Awherry v. McLean*, 19 C.L.J. 335.

A counterclaim was allowed in respect of short deliveries of cargoes of goods in an action for the price of the goods: *Cappelen v. Brown*, W.N. (1875) 231; so also a set-off of a County Court judgment was allowed in an action in a judgment of the Exchequer Court: *Sandys v. Louis*, W.N. (1875) 249; and also for damages for breach of an agreement to let and for specific performance in an action for rent: *Atwood v. Miller*, W.N. (1876) 11. Where plaintiff sues only one or more of several persons jointly liable under section 110, the defendant may avail himself

of any set-off or counterclaim to which he would be entitled if all parties liable were sued: Rule 282; *Stackwood v. Dunn*, 3 Q.B. 822; see *Toplis v. Grane*, 5 Bing. N.C. 636.

As to notices and particulars of counterclaim, see Rule 115.

Notice and Particulars of Counterclaim.—A counterclaim must in all cases be served upon the plaintiff not less than six days before the day of trial if he resides within the division, or a copy left for him with the Clerk if he resides without the division: Rule 115. If the counterclaim is not so served, the judge may, on such terms as he thinks fit, adjourn the trial of the action to enable the defendant to give such notice, or may in his discretion allow such notice to be given and the trial of the action to proceed at once: *Ib.*

Effect of Counterclaim.—A counterclaim not involving matter beyond the jurisdiction of the court has the same effect as a statement of claim in a cross-action, so as to enable the court to pronounce final judgment in the same action on the claim and cross-claim: Rule 106. Where the counterclaim involves matter beyond the jurisdiction, the practice is laid down in section 76. See also R.S.O. c. 51, s. 186, and Rules 114 and 127.

Counterclaim may be Disposed of in Separate Action.—Where it is contended by the plaintiff or any other party to the action that the counterclaim ought not to be disposed of by way of counterclaim, but in an independent action, the judge may, on application to him, make such order as shall be just: Rule 107.

Whether the counterclaim is to be allowed or disallowed is therefore a matter of discretion to be exercised upon consideration of all the circumstances, including rights involved in the counterclaim and the question of delay and convenience of trial: *Canadian Securities Co. v. Prentiss*, 9 P.R. 329; see *Holmstead & Langton's Jud. Act*, p. 437.

And where, in the case of counterclaim or of any incidental claim arising at the trial, the judge thinks it can be better disposed of by an independent action, he may order such claim to be excluded whether any application for that purpose be made to him or not: Rule 108; but the discretion given should only be exercised in the plainest cases: see notes to sections 174, 181 and 188, as to the exercise of discretionary powers.

Where the claim and counterclaim were of such a nature as might well and conveniently be tried together, the fact that the trial would involve considerable expense and inconvenience to witnesses was not sufficient ground for ordering the claim and counterclaim to be tried separately: *Benjamin v. Turner*, 18 C.L.T. 395. But the venue was changed in order to overcome the objection as to cost of witnesses: *Ib.*

Judgment on Counterclaim.—Although the effect of establishing a counterclaim is the same as the obtaining of cross-judgment, it is not necessary that a separate judgment be entered for the plaintiff and defendant respectively on the claim and counterclaim, but the balance may be struck, and, if in favor of the defendant, judgment may be for such balance, or for so much for the plaintiff on the claim and for so much for the defendant on the counterclaim: Rules 109, 110. This does not affect the question of costs, which would follow the event under section 213 in the absence of any order, and the plaintiff would be entitled to the costs of the claim and the defendant to the costs of the counterclaim: see *Canadian Pacific Ry. Co. v. Grant*, 11 P.R. 208; *Baines v. Bromley*, 6 Q.B.D. 695; *Hallinan v. Preece*, 41 L.T. 627; *Hawke v. Brerar*, 14 Q.B.D. 841; *Ward v. Morse*, 23 Ch. D. 377. But no relief exceeding that which the court has jurisdiction to administer shall be given to the defendant upon a counterclaim: Rule 109; section 76; see *Mellroy v. McEwen*, 12 Man. L.R. 164. In the case of a set-off, when the amount due the defendant exceeds the amount claimed by the

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plaintiff, the plaintiff may either be non-suited or an amount sufficient to satisfy his claim may be applied thereon, but the adjudication is no bar to the recovery by the defendant of the residue of the set-off: Rule 109; section 136.

If the plaintiff does not appear at the trial, and the defendant has given notice of a counterclaim not involving matter beyond the jurisdiction, he may prove such counterclaim so far as the burden of proof lies upon him, and have judgment accordingly; but such judgment may be set aside, as in the cases of judgment under sections 113 or 123: Rule 113; see notes to sections 113 and 123.

When judgment is given for defendant, he will be entitled to issue execution and take proceedings as in ordinary cases for the recovery of the balance, if it does not exceed the sum within the jurisdiction or if the defendant files with the clerk a consent in writing to abandon the excess: Rule 127.

Payment into Court when Lien Claimed.—Where an action is brought or a defendant, in his statement of defence or counterclaim, seeks to recover specific property, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to hold the property by virtue of a lien, or otherwise, as security for money, the judge, upon being satisfied, by affidavit, or otherwise, of the existence of such lien or security, may order that the party seeking to recover the property be at liberty to pay into court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interest and costs, as the judge may direct, and that, upon such payment into court being made, the property be given up to the party seeking to recover it: Rule 112. The whole sum for which the lien is claimed must be brought into court, though it exceeds the value of the property: *Gebruder Naf v. Ploton*, 25 Q.B.D. 13.

Relief against Third Parties.—Relief may be granted against a third party served with notice of the claim in writing, if any rule or order of the court is made: see R.S.O. c. 51, s. 58 (7). The Consolidated Rules do not apply: see *Pryor v. City Offices Co.*, 10 Q.B.D. 504; *Clarke v. Macdonald*, 4 O.R. 310; *Merchants Bank v. VanAllen*, 10 P.R. 348. No rules have been adopted by the Board of County Judges dealing with third parties.

Equitable Execution.—The declaration that the Division Courts have not the right to grant injunctions, has probably taken away the right of those courts to give relief by way of what is called equitable execution. Whenever a judgment debtor is entitled to an interest in real or personal property which cannot be seized under execution, because of some impediment, the High Court appoints a receiver of that interest as a substitute for execution. It was held that the plaintiffs were entitled to a receivership order to receive the defendant's interest in a life tenements policy which was fully paid up, the same having been assigned to the plaintiffs as security for a debt due to them, and the assignment entitling the defendant to receive from time to time the cash surrender value of the bonus additions to the policy, and so having ceased to be exigible in execution, under R.S.O. c. 77, s. 18, as a "security for money," on the principle that the benefit of the defendant's interest in the policy, under ordinary process, being defeated by a prior title—that of the assignee—not extending to the whole interest of the defendant in the property upon which the judgment was proposed to be executed, the plaintiffs were entitled to the aid of the court to enable them to reach it: *Canadian Mut. L. & S. Co. v. Nisbet* 36, C.L.J. 162. The appointment of a receiver does not create a charge but operates as an injunction to restrain the defendant himself from receiving

the property: *Per Lindley, L. J., Sartoris v. Sartoris*, (1892) 1 Ch. 11; *Tyrell v. Panton*, (1895) 1 Q.B. 202, 206; *Croshaw v. Lyndhurst Ship Co.*, (1897) 2 Ch. 154; see *McLean v. Allen*, 18 P.R. 255. Such an appointment is not execution but equitable relief, a substitute for execution: *Re Shephard*, 43 Ch. D. 131; *McFadden v. Kerr*, 35 C.L.J. 316; *Levasseur v. Mason*, (1891) 2 Q.B. 73; and, therefore, under the rule of the High Court, C.R. 864, corresponding with Division Court Rule 140, the executors of a deceased judgment creditor are not entitled to the appointment of a receiver: *Norburn v. Norburn*, (1894) 1 Q.B. 448; *Re Craig v. Leslie*, 18 P.R. 270. The appointment of a receiver is clearly a "relief, redress or remedy" within section 75; *Barrowman v. Fader*, 35 C.L.J. 642. It has been usual for Division Courts to appoint receivers, but their power to make the appointment has not been discussed in any reported case. Where a receiver was appointed by a Division Court on the 6th August, 1898—after the amendment of 1898, as to injunctions, (section 75 (2)) came into force—of an interest of a debtor under a will, but the right of the debtor to anything depended upon the discretion of executors and was, therefore, of such a nature under *R. v. Lincolnshire (Judge)*, 20 Q.B.D. 167, that a receiver could not be appointed, the court awarded prohibition on the latter ground, but the effect of the amendment of 1898 was not referred to: *Re McInnes v. McGaw*, 30 O.R. 38.

A receiver cannot be appointed of any interest which can be reached by execution or by process for the attachment of debts: *Manchester & L.D. Banking Co. v. Parkinson*, 22 Q.B.D. 173; *Hamilton v. Brogden, W.N.* (1891) 36; *Harris v. Beauchamp*, (1894) 1 Q.B. 801; nor of salary not yet earned: *Trust and Loan Co. v. Gorsline*, 12 P.R. 654; *Holmes v. Millage*, (1893) 1 Q.B. 551; nor of the box receipts of a theatre: *Cadogan v. Lyric Theatre (Limited)*, (1894) 3 Ch. 338.

If an order appointing a receiver vests no property in him and gives him no lien or charge upon the property to be received, the title to the property must remain vested in the debtor and he is able to give a valid discharge thereof but for the injunction restraining him from receiving the property. The person from whom the money is to be received can only be proceeded against by the receiver in the name of the debtor: *McGuin v. Fretts*, 13 O.R. 699; *Stuart v. Grough*, 14 O.R. 255; and if such person has paid the money to the debtor, without notice of the order, he will be discharged; but if the payment has been made after notice, he will be guilty of contempt of court for aiding and abetting the breach of the injunction: *Seaward v. Paterson*, (1897) 1 Ch. 545.

The Division Courts being deprived of the power of granting injunctions are probably powerless, therefore, to aid a judgment creditor by the appointment of a receiver. Formerly this difficulty could have been overcome by obtaining a transcript of the judgment to a county court, but the provisions respecting such transcripts having been repealed, the only remedy which can be suggested is an action for equitable relief in the County Court. But the cases of *Berkeley v. Elderkin*, 1 E. & B. 805; *Austin v. Mills*, 9 Ex. 288; *Bailey v. Bailey*, 13 Q.B.D. 855; *R. v. Cy. Ct. Judge of Essex*, 18 Q.B.D. 706; *McPherson v. Forrester*, 11 U.C.R. 362; *Donnelly v. Stewart*, 25 U.C.R. 39, and *Aldrich v. Aldrich*, 23 O.R. 376; 24 O.R. 124; cited *ante* p. 5, seem to indicate that such an action could not be maintained.

Property vested in trustees for the debtor: *Kineaid v. Reid*, 21 C.L.J. 144; *Stuart v. Grough*, 15 A.R. 299; an equitable right of the debtor to a mortgage: *Moot v. Gibson*, 21 O.R. 248; a reversionary interest in personality: *Flegg v. Prentice*, (1892) 2 Ch. 428; an interest as a legatee or next of kin in an estate: *Mullane v. Ahern*, 28 L.R. Ir. 105; a right to unascertained and unadjusted insurance moneys: *Boyd v. Hanes*, 5 P.R. 15; *Simpson v. Chase*, 14 P.R. 280; *Canada Cotton Co.*

v. Parmalee, 13 P.R. 26, 308; or the right of a debtor in a chose in action which he has assigned only as collateral security: Canadian Mutual L. & S. Co. v. Nisbet, 36 C.L.J. 162; cannot, therefore, be reached in the Division Court.

Equitable Execution against Lands.—The jurisdiction of Division Courts to order a sale of lands by way of equitable execution, is discussed in the notes to section 230.

Attachment and Sequestration.—Attachment and sequestration are "remedies," and, possibly, for disobedience to orders within the jurisdiction, the Division Courts are equipped with all the powers of the High Court: *Martin v. Bannister*, 4 Q.B.D. 212, 491; *Richards v. Collurne*, 7 Q.B.D. 623; but in *Re Jackson v. Clarke*, 36 C.L.J. 68, a Division Court judge refused to commit a judgment debtor for refusing to produce documents under a subpoena *duces tecum*, upon the ground that the Act does not contain any provision expressly authorizing a committal; and a mandamus to compel him to do so was refused.

Specific Delivery of Chattels.—Under C.R. 588 the High Court has power to order specific delivery of chattels in an action of detinue. This is a "remedy," and it would seem that a Division Court has like power: *Winfield v. Boothroyd*, 54 L.T. 574.

Mandamus.—In actions within the jurisdiction of Division Courts, in which, as part of the remedy, in similar actions in the High Court, a mandamus would be granted, the Division Courts would apparently have the same jurisdiction. See notes *ante* p. 70.

36. Where in any proceeding before a Division Court any defence or counter-claim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counter-claim shall not affect the competence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counter-claim. R.S.O. 1887. c. 51, s. 74.

Duty of court where defence or counter-claim involves matter beyond jurisdiction

[As to removal into High Court, see Cap. 51, sec. 186.]

Defences beyond the Jurisdiction.—But for this section and Rule 114 the Division Courts would have no power to investigate the subject matter of any counterclaim if the amount claimed was beyond the jurisdiction. Any counterclaim may be entertained up to the full amount of the plaintiff's claim. As soon as judgment is obtained of sufficient amount to equal the plaintiff's claim, then, if the counterclaim is beyond the jurisdiction of the court, the court should hold its hand, and, as regards the overplus of the counterclaim, that should be dealt with by another court: *Davis v. Flagstaff Silver Mining Co.*, 3 C.P.D. 228. But in the Division Court the defendant may, under the provisions of Rule 127, obtain judgment and execution for any balance in his favor if it does not exceed a sum within the jurisdiction of the court. Execution may issue for the balance if it does not exceed \$100, under section 72, s-s. 1 (b), and, if it does not exceed \$200, under section 72 s-s. 1 (c); and if the balance for which judgment is given exceeds a sum within the jurisdiction, the defendant may file a consent in writing abandoning the excess, and issue execution for an amount not exceeding the jurisdiction: Rule 127. This would appear, however, to be an extension of the juris-

diction, which is *ultra vires* the Board of County Judges: see *Fellows v. Owners of the "Lord Stanley,"* (1893) 1 Q.B. 98, and notes to sec. 306.

Where, in an action in the County Court, to recover an amount for salary, etc., a counterclaim was set up for advances made to the plaintiff, and the plaintiff recovered \$308.55, and the amount found due under the counterclaim was \$1,169.54, the defendant was held to be entitled to judgment to the full amount of the plaintiff's claim: *Wallace v. People's Life Ins. Co.*, 30 O.R. 438.

The Judicature Act, R.S.O. c. 51 s. 186 provides: "In any case in a County or Division Court where the defence or counterclaim of the defendant involves matter beyond the jurisdiction of the court, the High Court or any judge thereof, may on the application of any party to the proceeding, order that the whole case be transferred from such court to the High Court, and thereupon all the proceedings in such case shall be transmitted by the clerk or other proper officer, of the County or Division Court to the said High Court; and the same shall thenceforth be continued and prosecuted in the High Court as if it had been originally commenced therein."

Where an order to transfer is made under this section, or under section 82, the clerk of the court must annex together all the proceedings and papers filed with him and transmit the same together with the order of transference or a copy thereof to such officer of the High Court as the order directs: Rule 182. For form of order see form 166.

The record in such proceedings would therefore be the summons, the particulars of claim, the set off and counterclaim and all other papers on file as well as the order of transference.

After the transfer the proceedings are regulated by the practice in the High Court: *Davis v. Williams*, 13 Ch. D. 550. The power given by the section is not to transfer a part but the whole proceeding: *Davis v. Flagstaff Mining Co.*, 3 C.P.D. 228 at p. 332. The application to transfer cannot be made *ex parte*: *Anon.*, W.N. (1876), 12.

It was held that a defendant who counterclaims for an amount beyond the jurisdiction without abandoning the excess, is not entitled, as of right, to have the action transferred when there is nothing in the nature of the counterclaim which puts it outside the jurisdiction of the court except the amount. The excess in amount must either be deemed to be abandoned or the counterclaim is improperly put in for the larger amount, and in neither case can the defendant be entitled to the transfer: *Mellroy v. McEwan*, 12 Man. L.R. 164.

No privilege to exempt from jurisdiction of Court.

77. No privilege shall be allowed to any person to exempt him from suing and being sued in a Division Court; and any executor or administrator may sue or be sued therein; and the judgment and execution shall be such as in like cases would be given or issued in the High Court. R.S.O. 1887, c. 51, s. 75.

No Privilege Shall be Allowed.—At one time certain classes were privileged from service of summonses or arrest: see *Lyster v. Boulton*, 5 U.C.R. 632; *R. v. Gamble*, 9 U.C.R. 546; but this abolishes any privileges in Division Courts.

Minors may sue for wages.

78. A minor may sue in a Division Court for any sum not exceeding \$100 due to him for wages, in the same manner as if he were of full age. R.S.O. 1887, c. 51, s. 76.

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A Minor May Sue for Wages.—This is a special privilege given to minors, i.e., persons under 21 years of age.

It does not restrict infants from suing for anything but wages, but was intended to enable them to recover for their own labor in their own name: *Ferris v. Fox*, 11 U.C.R. 612. In all other actions and proceedings a minor must procure the attendance of a next friend at the office of the clerk on entering the suit, who shall sign an undertaking (form 194) to be responsible for costs, and the cause shall proceed in the name of the infant by such next friend: Rule 235.

An infant has six years to bring such action after attaining his majority: *Taylor v. Parnell*, 43 U.C.R. 239. It is doubtful if an infant can hire himself for wages to his parent and whether the contract is binding on the latter: *Perlet v. Perlet*, 15 U.C.R. 165; but see *Smith v. Smith*, 29 O.R. 309. The wages of a minor belong to himself and not to his parents: *Delesdernier v. Burton*, 12 Gr. 569.

A next friend is not a party to the action: *Re Corsellis*, 31 W.R. 414; *Dyke v. Stephens*, 30 Ch. D. 189; *Taylor v. Wood*, 14 P.R. 449.

In general a next friend is in the same position as any other litigant, and receives or pays costs personally as between himself and the defendants: *Smith v. Mason*, 17 P.R. 444. And if the plaintiff or claimant fail in, or withdraw, or discontinue his suit, and do not pay the amount of costs awarded against him, proceedings may be taken for the recovery of such amount from the next friend, as for the recovery of any judgment debt: Rule 235.

Any person, except the defendant, may commence an action as next friend of an infant: *Re Taylor*, W.N. (1881) p. 81; *Lewis v. Nobbs*, 8 Ch. D. 591. See *Re Burgess*, 25 Ch. D. 243. A father having no adverse interest to his children will be preferable to a stranger: *Woolf v. Pemberton*, 6 Ch. D. 19. The next friend need not be a solvent person: *Re McConnell*, 3 Ch. Chas. R. 423; see *Jones v. Evans*, 31 Sol. Jour. 11; *Foster v. Cantley*, 10 Ha. App. 24. A married woman would not be a good next friend: *Thynne v. St. Maur*, 34 Ch. D. 465. It was held under C.R. 197, that if an action is commenced without a next friend, the irregularity, if any, would be waived by the appearance of the defendant: *Per James, L.J.*, *Ex parte Broeklebank*, 6 Ch. D. 358. But in the Division Courts the rule is in the imperative. If a suit should be instituted on behalf of an infant without a next friend, it might be dismissed with costs, to be paid by the party entering it: *Daniels Ch. Pr.* 6th ed. 105. The next friend cannot bind the infant by a compromise unless it is made for the benefit of the infant: *Rhodes v. Swithenbank*, 22 Ch.D. 577.

An infant is not liable for a devastavit as an executor *de son tort*: *Young v. Purves*, 11 O.R. 597.

The doctrine of contributory negligence does not apply to an infant of tender age: *Merritt v. Hepenstal*, 25 S.C.R. 150.

An infant cannot be a common informer: *Garrett v. Roberts*, 10 A.R. 650.

Though the Factory Act, R.S.O. c. 256, s. 2 (5), prohibits the employment of children under 14 years of age it is not a ground for a civil action for damages in case of accident, unless there is evidence to connect the violation of the Factory Act with the accident: *Roberts v. Taylor*, 31 O.R. 10.

A mother is not under any legal obligation to maintain her children: *Wilson v. Boulter*, 26 A.R. 184; see *Wright v. McCabe*, 30 O.R. 390.

Rights and Liabilities of Master and Servant.—The right of a servant to recover his wages, when recoverable on an entire contract of service and payable in an indivisible sum, depends on the complete performance of

his term of service. If hired, for instance, for a year for a lump sum as wages, and he leaves before his time has expired without just cause, he forfeits his wages: *Huttman v. Boulnois*, 2 C. & P. 510; *Lilley v. Elwin*, 11 Q.B. 742; *Turner v. Robinson*, 5 B. & Ad. 789; *Blake v. Shaw*, 10 U.C.R. 180. See also *Warburton v. Heyworth*, 6 Q.B.D. 1; *Barrie Gas Co. v. Sullivan*, 5 A.R. 110; *Sherlock v. Powell*, 26 A.R. 407. But if the servant has been paid any portion of such year's salary the employer is not entitled to recover it back, neither is he entitled to have it applied on account of moneys payable in respect of a previous year's service. Although the employer, on dismissing his servant, may have assigned one ground therefor, he is not precluded from afterwards showing the entire ground for such dismissal: *Tibbs v. Wilkes*, 23 Gr. 439; but see *Maw v. Jones*, 25 Q.B.D. 107. The rule that an indefinite hiring is to be taken as a yearly one (*Rettinger v. Macdougall*, 9 C.P. 485), is not a rule of law, but the jury are to say what the terms of the hiring were, judging from the circumstances of the case; thus, on an indefinite hiring at certain weekly wages, the jury may infer the hiring was weekly: *Baxter v. Nurse*, 6 M. & G. 935; see *Bain v. Anderson*, 28 S.C.R. 481; *Holloway v. Lindberg*, 30 N.S.R. 421. So a hiring at "two guineas a week for one year" is a weekly hiring: *Robertson v. Jenner*, 15 L.T.N.S. 514, *per Bramwell, B.*; or at "£2 a week and a house": *Evans v. Roe*, L.R. 7 C.P. 138, is a hiring by the week and not by the year. There is no inflexible rule that an indefinite hiring of a clerk must be construed as a hiring by the year: *Fairman v. Oakford*, 5 H. & N. 635. In that case the plaintiff entered the defendant's employment at a salary of £250 a year, which was paid weekly. The jury found it a weekly hiring and the court refused to interfere: see also *Rettinger v. Macdougall*, 9 C.P. 485. Where a book-keeper engaged for one year, and his employment was continued afterwards, it was held that there was no presumption that it was to continue for another year. The employer may dismiss him at any time upon reasonable notice, and where there is no evidence of usage, the customary three months' notice is reasonable: *Harnwell v. Parry Sound Lumber Co.*, 24 A.R. 110.

Where plaintiff, who had been hired for one year, was retained in the services of a company which afterwards bought out the business of the employer, it was held that as on the evidence there was no hiring for a definite period but merely a temporary arrangement, the plaintiff could not recover damages for dismissal: *Bain v. Anderson*, 24 A.R. 296; 28 S.C.R. 481.

A person engaged by the president of a company at a fixed salary per month is entitled to recover at the rate agreed on for his services, although there was no contract under seal: *Forrest v. Great N.W. Central Ry. Co.*, 12 Man. L.R. 472; *Bernardin v. North Dufferin*, 19 S.C.R. 581.

Should a person be hired for a year, his wages payable at the rate of so much per month, it is submitted, on the authority of *Taylor v. Laird*, 1 H. & N. 266; *Fairman v. Oakford*, 5 H. & N. 635, and *Button v. Thompson*, L.R. 4 C.P. 330, to be clearly established that each month's wages would become vested at the end of each month and could not be divested by any misconduct of the servant, and that the rule about forfeiture of wages does not apply to such a case. The case of *Walsh v. Walley*, L.R. 9 Q.B. 367, is clearly distinguishable from the others. Where a master, having a right to discharge his servant for misconduct, condones the act and retains the servant, he cannot afterwards discharge him for the same act: *Phillips v. Foxall*, L.R. 7 Q.B. 680, *per Blackburn, J.*; but this condonation is subject to the implied condition of future good conduct, and whenever any new misconduct occurs the old offences may be invoked and put in the scale against the offender as cause for dismissal: *McIntyre v. Hockin*, 16 A.R. 498. With regard to menial or domestic servants

there is a common understanding, though the contract is for a year, that it may be dissolved by either party on giving a month's warning or a month's wages: *Beeston v. Collyer*, 4 Bing. 313, *per Gaselee, J.*; *Fawcett v. Cash*, 5 B. & Ad. 904; *Nowlan v. Ablett*, 2 C.M. & R. 54. If the master should, without just cause, turn the servant away without notice, the latter would be entitled to recover a month's wages beyond the arrears: *Robinson v. Hindman*, 3 Esp. 235; but see *Maw v. Jones*, 25 Q.B.D. 167. If a servant misconduct himself, the master may turn him away without any warning: *Spain v. Arnott*, 2 Stark, 256. A refusal to obey a lawful order (as to remain at home at a certain time, or to do a proper day's harvest work, etc.), is a good ground of dismissal: *s.e.*, and *Lilley v. Elwin*, 11 Q.B. 742. And it matters not how reasonable or urgent the excuse for the servant's wilful absence may be: *Turner v. Mason*, 14 M. & W. 112. See *McEdward v. Ogilvie Milling Co.*, 8 C.L.T. 150; 5 Man. L.R. 77. If a clerk claims to be a partner he can be forthwith dismissed: *Amor v. Fearon*, 9 A. & E. 548. So where a clerk disobeys a direction to apply remittances in a particular way: *Smith v. Thompson*, 8 C.B. 44; or a traveller neglects immediately to remit sums collected in accordance with the terms of his engagement: *Blencarn v. Hodges' Distillery Company*, 16 L.T. 608; or sells his employer's goods to a brothel keeper *ib.*; or where a servant embezzles, though his wages due exceed what he has embezzled: *Brown v. Croft*, 1 Chitty, Princ. 82. So where a servant employed to purchase goods for his master, accepts even on a single occasion a commission from the seller without his master's knowledge: *Boston Deep Sea, &c., Co. v. Ansell*, 39 Ch.D. 339; see *Lister v. Stubbs*, 45 Ch.D. 1; or is discovered in any gambling transaction or in the nature thereof: *Pearee v. Foster*, 17 Q.B.D. 536; *Priestman v. Brastreet*, 15 O.R. 558; or is found drinking intoxicating liquor while on duty as a roadmaster on a railway: *Marshall v. Central Ontario Ry. Co.*, 28 O.R. 241. Where a person is engaged by a firm, the death of one of the partners puts an end to the contract, and no action can be brought against survivors for not employing the plaintiff: *Tasker v. Shepherd*, 6 H. & N. 575; *Burnet v. Hope*, 9 O.R. 10; but a voluntary parting with the business is a breach of the contract to employ: *Stirling v. Maitland*, 5 B. & S. 840; and so is a dissolution of a partnership, although the continuing partners offer employment on the same terms: *Brace v. Calder* (1895) 2 Q.B. 253; and the fact that the defendants' manufactory had been burnt down would be no excuse for dismissal: *Turner v. Goldsmith*, (1891) 1 Q.B. 544. It is different with a person paid by commission: *Ex parte Maclure*, L.R. 5 Ch. 737; but see last case. It is an implied condition in contracts for personal service, that the death of either party shall dissolve the contract: *Farrow v. Wilson*, L.R. 4 C.P. 744. Incapacity in a servant from illness arising after a contract for personal service, absolute in its terms, has been entered into, is an answer to an action for its breach: *Boast v. Firth*, L.R. 4 C.P. 1; *Robinson v. Davidson*, L.R. 6 Eq. 269; 24 L.T. 755.

Incapacity of the servant from sickness does not determine the contract, nor will it justify dismissal without regular notice: *R. v. Winterset*, Cald. 298. On the other hand, it has been held that a servant is entitled to be paid his wages during the time of illness: *Patten v. Wood*, 51 J.P. 549; 36 Alb. L.J. 399, 400. In *Cuckson v. Stones*, 1 E. & E. 248, it was held that temporary inability did not suspend the right to wages, but total and permanent disability, such as paralysis, etc., would justify a reversion of the contract. But such total inability does not deprive the servant of his right to wages for the time he actually served, where the agreement is not for any specified time: *Bayley v. Rimmell*, 1 M. & W. 506.

A sailor disabled in the course of his duty is entitled to wages for the whole voyage: *Chandler v. Grieves*, 2 H. Bl. 606 (note); 3 R.R. 525. Incompetence or ignorance will justify dismissal: *Harmer v. Cornelius*, 5 C.B.N.S. 236.

Where an apprentice, who could have been dismissed at a week's notice, was dismissed without notice, the defendants not acting under the notice clause, he was held entitled to recover for all damages flowing naturally from the breach, and was not limited to the value of a week's notice: *Maw v. Jones*, 25 Q.B.D. 107.

A clerk taken into an office for "three months on trial at a salary of \$800 per annum," held not a yearly hiring: *Hughes v. Can. P. L. & S. Socy.*, 39 U.C.R. 221. Under a contract of hiring, with a reservation on the part of the employer of the right of dismissal at any time, if he has cause, the employer may discharge the employee at any time, provided the right is exercised *bona fide* and without malice: *Doyle v. Wurtzburg*, 32 N.S.R. 107.

A contract to serve for one year, the service to commence on the second day after that on which the contract is made, is a contract not to be performed within a year and is within the 4th section of the Statute of Frauds: *Britton v. Rossiter*, 11 Q.B.D. 123. The statute does not avoid the contract, but only bars the remedy: *Maddison v. Alderson*, 8 App. Cas. 473; *McMannus v. Cooke*, 35 Ch.D. 681.

A suit by the servant against the master for debt arising out of an independent transaction is not a cause of a discharge of the servant: *Clay Com. Telephone Co. v. Root*, 33 Alb. L.J. 215.

Unless a specific contract of hiring be proved, the court will discountenance an action by a child against a parent or person occupying a parental position for services rendered while living in the parent's, or such person's house: *Sprague v. Nickerson*, 1 U.C.R. 284; *Wisner v. Wisner*, 23 U.C.R. 519; *Peckham v. Depotty*, 17 A.R. 273; and where an action was brought by a woman against her brother, with whom she had lived for several years, it was held there was no implied promise to pay: *Redmond v. Redmond*, 27 U.C.R. 220. But a promise of remuneration may be recovered upon: *McGugan v. Smith*, 21 S.C.R. 263; see *Hendricks v. Hendricks*, 27 U.C.R. 447. See also *Re Ritchie*, *Sewery v. Ritchie*, 23 Gr. 66; *Pickering v. Ellis*, 28 U.C.R. 187.

Where services were rendered in expectation of marriage, but no contract of hiring, held that a refusal to marry did not entitle plaintiff to maintain action for wages: *Robinson v. Shistel*, 23 C.P. 114.

Causes of
action not
to be
divided.

79.—(1) A cause of action shall not be divided into two or more actions for the purpose of bringing the same within the jurisdiction of a Division Court, and no greater sum than \$100 shall be recovered in any action for the balance of an unsettled account, nor shall any action for any such balance be sustained where the unsettled account in the whole exceeds \$400. R.S.O. 1887. c. 51, s. 77.

Principal
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ately.

(2) Where a sum for principal and also a sum for interest thereon is due and payable to the same person upon a mortgage, bill, note, bond or other instrument, he may notwithstanding anything in this section contained, but subject to the other provisions of this Act, sue separately for every sum so due. 60 V. c. 14, s. 5.

Splitting a Cause of Action.—It is often a difficult matter to say what is "dividing a cause of action" within the meaning of this and the corresponding section of the English Acts, 9 and 10 Vic. c. 95, s. 63, and 51 and 52 Vic. c. 43, s. 81. The expression "cause of action" in this

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section means "cause of one action," and is not limited to an action on one separate contract: *Grimbley v. Aykroyd*, 1 Ex. 479.

"A cause of action" is the entire set of facts that give rise to an enforceable claim: the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment: *Per* Lord Esher, *M.R.*, *Read v. Brown*, 22 Q.B.D. 128; see *Wright v. Arnold*, 6 Man. L.R. 1.

Where a tradesman had an account against a party for an amount within the jurisdiction of the court, in which the items were so connected with each other that the dealing was not intended to terminate with one contract, but to be continuous, so that one item, if not paid, should be united with another, and form one continuous demand, it was held to be a "cause of action" within the meaning of the section, and the fact that one item in the account was separated from the rest by an interval of several years did not prevent the section from operating: *Copeman v. Hart*, 14 C.B.N.S. 731; see also *Re Grace v. Walsh*, 10 U.C.L.J. 65; 3 P.R. 196; *Kimpton v. Willey*, 9 C.B. 719.

A tradesman's bill for a series of articles (even though the claim was contracted within the jurisdiction of different courts) cannot be split into different causes of action: *Bonsey v. Wordsworth*, 18 C.B. 325, following *Grimbley v. Aykroyd*, 1 Ex. 479 and *Wood v. Perry*, 3 Ex. 442.

When it is to be inferred that it was contemplated that there should be continuous dealing to be included in periodical bills, the result of the arrangement and the legal position of the parties is that, upon the delivery and acceptance of the first parcel an entire contract is created and a complete cause of action arises, the tradesman being under no obligation to give further credit. When on a subsequent day other goods are delivered and accepted, a new contract arises, not simply to pay for the goods then delivered, but a new entire contract by which the tradesman waives the right to payment for prior goods, and the purchaser agrees to pay for both parcels as upon an entire sale. After the successive waiver and extinguishment of each preceding contract, the only existing contract and cause of action *ex contractu* will be the last: note of *Sergeant Manning*, *Dodd v. Wigley*, 17 C.B. 115; *Morris v. Tharle*, 24 O.R. 159.

In a contract for carrying timber by barge from one place to another, a charge for hauling by horses part of the way forms part of the entire contract, and cannot be sued for separately: *Barnes v. Marshall*, 18 Q.B. 785.

Damages against a carrier for breach of a contract of carriage must all be recovered in one action, though part of the goods are delivered to A. and the remainder to B.: *Russell v. Waterford and Limerick Ry. Co.*, 16 L.R. Ir. 314.

When premises were rented at \$125 a month, no formal lease being made and four months' rent became due, it was held that separate claims for three instalments of rent was the splitting of a cause of action: *Re Gordon v. O'Brien*, 11 P.R. 287.

This case is in conflict with *Wallace v. Whelan*: *Circuit Reports in Ireland*, 582; but it was followed in *Re Clark v. Barber*, 26 O.R. 47, where interest and taxes alone were held not to be recoverable apart from instalments of principal due on an agreement to pay the principal by instalments with interest half-yearly and taxes; and in *Re McDonald v. Dowdall*, 28 O.R. 212, in which it was held that an action for \$100 interest due on a deposit receipt upon which the whole sum was part due and collectable was splitting the cause of action. In the last case, *Re Clark v. Barber*, 26 O.R. 47, was followed but commented on as irreconcilable with such cases as *Dickenson v. Harrison*, 4 Price, 282, approved of in *Attwood v. Taylor*, 1 M. & G. 307.

An action brought to recover two instalments of interest paid by the plaintiff on a mortgage against the payment of the principal and interest of which the defendant had contracted to indemnify him, was held by Armour, C.J., to be a splitting of the cause of action within the meaning of this section: *Ball v. Bell*, 26 O.R. 123; but this decision was reversed by the Divisional Court: 26 O.R. 601. By sub-section 2, separate actions may now be brought in the Division Court for principal or interest "upon a mortgage, bill, note, bond or other instrument" payable to the same person. But even now a mortgagee cannot sue in the Division Court for the amount of an instalment of interest within the jurisdiction when other instalments of interest are due, which bring the whole amount beyond the jurisdiction: *Re Real Estate Loan Co. v. Guardhouse*, 29 O.R. 602.

In *Wickham v. Lee*, 12 Q.B. 526, Erle, J., says: "It is not a splitting of actions to bring distinct claims where, in a superior court, there would have been two counts. I am not sure whether the Court of Exchequer puts it so, but that is clearly the true construction of the Act." In that case it was held no contravention of the section to bring separate actions for rent of premises and for double value for holding over after notice to quit; but see this case explained in *Re Clark v. Barter*, 26 O.R. 47. Where two promissory notes would, in an action at law, have been declared on in two separate counts, the bringing of two separate actions to recover upon them is not splitting a cause of action: *Re Franklin v. Owen*, 15 C.L.T. 158, 185; *McGorlick v. Ryall*, 26 O.R. 435; see *Re Babcock v. Ayres*, 27 O.R. 47; *School Trustees of Nottawasaga v. Township of Nottawasaga*, 15 A.R. 310.

Damage to goods and injury to the person, although they have been occasioned by the one and the same wrongful act, are infringements of different rights, and give rise to distinct causes of action: *Brunsdon v. Humphrey*, 14 Q.B.D. 141; see notes to section 7.

In *School Trustees of Nottawasaga v. The Township of Nottawasaga*, 15 A.R. 310, it was held that a judgment in the Division Court against the township council for the surplus school-rates received by them in 1891, did not preclude the plaintiffs from recovering, in an action in the County Court, the surplus received in the five subsequent years, and that the recovery in the Division Court was for separate and distinct causes of action. This case is explained in *Re Clark v. Barber*, 26 O.R. 47.

An action to recover the first instalment due on a promissory note payable in three annual instalments, is not splitting a cause of action: *Re Babcock v. Ayres*, 27 O.R. 47; nor is an action by an assignee for the benefit of creditors against one of several persons to recover from him his share of moneys divided amongst such persons in contravention of the provisions of the Act respecting Assignments and Preferences, R.S.O. c. 147, s. 2 s.s. 4, although the total amount of the payment to all such persons is beyond the jurisdiction: *Re Beattie v. Holmes*, 29 O.R. 264.

Money paid by the endorser of two notes, as against the executrix of the maker, was held one cause of action, and the plaintiff having sued for and recovered one sum, could not bring another action for the amount of another payment made by him: *per Logie, Co.J.*, *Gilbert v. Gilbert*, 4 C.L.J. 229; but this is not good law in view of *Re Franklin v. Owen*, 15 C.L.T. 158, 185, and other cases cited above. A claim for an alleged breach of an agreement to return a yoke of oxen in as good condition as when they were hired, and a claim for the hire of the same oxen both claims arising out of the same contract of hiring, constitute but one cause of action: *per Hughes, Co.J.*, *Light v. Lyons*, 7 U.C. L.J. 74.

On a contract for the delivery by shipment of a large quantity of deals, in instalments, each instalment to be paid for on delivery, it was

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held that the plaintiff could recover on each shipment as delivered: *O'Leary v. Stewart*, 9 C.L.T. 494.

A., having a cause of action against B. for £19 0s. 8d. for money lent between 1846 and 1848, also a cause of action on a separate account for goods sold and delivered, work and labor, and money paid between 1845 and 1849 amounting to £19 19s. 0d., after deducting a payment of £8 5s. 3d. on account, levied two plaints in respect of them in the County Court. *Held*, that this was not a splitting of a cause of action: *Kimpton v. Willey*, 9 C.B. 719.

Claims for goods sold and money lent, though entered in plaintiff's books as one account, are not one cause of action: *Brunskill v. Powell*, 1 L.M. & P. 550; nor are two claims, one for salary and the other for money lent: *Richards v. Martin*, 23 W.R. 93; nor a demand for a horse sold, another for rent due, and a third for goods sold and delivered: *Neale v. Ellis*, 1 D. & L. 163; nor claims for work and labor, and another for a balance due for money paid by plaintiff for the defendant: *McRae v. Robins*, 20 C.P. 135.

The true distinction between demands, rights or causes of action which are single and entire and those which are distinct is, could they all have been included in the prior statement of the cause of action? By this is not meant in the same petition or suit, for a party may have as many suits as he has causes of action, and may bring them at different times or at the same time, but if he brings them and they are depending at the same time and by the same tribunal, he does so subject only to the right of consolidation if they be such as could have been united in one petition: *Secor v. Sturges*, 16 N.Y. 554; *Perry v. Dickerson*, 85 N.Y. 345.

Prohibition will be granted when a party splits a cause of action to bring it within the jurisdiction of the Division Court: *Re Grace v. Walsh*, 3 P.R. 196; *Gilbert v. Gilbert*, 4 C.L.J. 229; *Light v. Lyons*, 7 C.L.J. 74; *McRae v. Robins*, 20 C.P. 135; *Re Clark v. Barber*, 26 O.R. 47; *Ball v. Bell*, 26 O.R. 60, and other cases cited *supra*.

A defendant has not the right to say that there was a splitting of the action on the trial of the second action: *Grace v. Walsh*, 3 P.R. 196; *Adkin v. Friend*, 38 L.T. 393. See also *Winger v. Sibbald*, 2 A.R. 610; *Re Box v. Green*, 9 Ex. 503.

There must be something done by the plaintiff (in the first action) to constitute an abandonment of the excess of the demand. Where the debt exceeds the sum to which jurisdiction extends, that cures as a defence, and entitles the defendant to judgment, unless the plaintiff brings himself within the jurisdiction by abandoning the excess: *Vines v. Arnold*, 8 C.B. 632.

Balance of an Unsettled Account.—By 39 Vic. c. 15, s. 2, the amount of an unsettled account inquirable into, was increased from \$200 to \$400. The cases decided before the change in this law must now be read "four" instead of "two" hundred dollars, as the maximum amount of an unsettled account.

An unsettled account means an account the amount of which has not been adjusted, determined or admitted by some act of the parties: see *Robb v. Murray*, 16 A.R. 503; *Dougall v. Leggo*, 1 West. L.T. 203, 246.

Where plaintiff sued on a demand exceeding \$200, but abandoned the excess over \$99.75, and defendant claimed set-off exceeding \$400, consisting of various unconnected items: *Held*, within the jurisdiction of the court: *Read v. Wedge*, 20 U.C.R. 456.

Plaintiff claimed balance of £49 on two notes of £15 each and interest, gave credit for £23 and abandoned excess over £25; *Held*, that the court had jurisdiction: *Re Higginbotham v. Moore*, 21 U.C.R. 326.

An unsettled account exceeding \$400 reduced by payment to \$100 is not within the jurisdiction: *Waugh v. Conway*, 4 L.J.N.S. 228.

The plaintiff may recover \$100, being the balance of an unsettled account not exceeding \$400, but when the whole account exceeds that sum there is no jurisdiction.

Where plaintiff sued for \$84 balance due for rent for several years at \$160 a year, after deducting payments made from time to time, held, not within the jurisdiction: *Re Hall v. Curtain*, 28 U.C.R. 533, overruling *Miron v. McCabe*, 4 P.R. 171.

Plaintiff, before 39 Vic. c. 15, claimed \$94.88, annexing to his summons particulars of his claim showing an account for goods for \$384.23, reduced by credits to the sum sued for; but nothing had been done by the parties to liquidate the account or ascertain the balance, except a small amount admitted to have been paid, and a credit of \$33 given for some returned barrels, but which still left an unsettled balance of upwards of \$300. Held, not within the jurisdiction: *Re The Judge of Northumberland and Durham*, 19 C.P. 299.

Plaintiff, who was employed by defendants to purchase wool for them on commission, sued them for this commission and \$10 paid to an assistant. It appeared that defendants had furnished plaintiff with \$1,100, and that plaintiff had expended \$36 beyond that sum in the purchase of wool, but no question was made at the trial as to the due expenditure of \$1,100, the only question being whether plaintiff was entitled to any commission at all, and no claim was made for the \$36 or any part of it, the plaintiffs demand being confined to the commission claimed on the quantity of wool purchased, and not on the price paid: Held, not an action for balance of an unsettled account exceeding \$200, the balance of the unsettled account being \$36, which was not in question: *McRae v. Robins*, 20 C.P. 135.

Plaintiff, before the passing of 39 Vic. c. 15, sued for \$30 due as a balance of an account for board for self and horse, which appeared at the trial to be for a balance of an unsettled account exceeding \$200. He also sued for board for self and horse for a subsequent period, and abandoned the excess of \$12 over \$100. On objection being taken to the jurisdiction, the judge allowed an amendment. The plaintiff then altered his claim, reducing it to \$82, only, and the case was again tried and judgment reserved, whereupon application was made for prohibition. Held, that the Division Court had jurisdiction independently of 39 Vic. c. 15, s. 2, but that under that Act the claim might have been investigated, as the subsequent proceedings took place after its passing, and there was, therefore, no necessity for any amendment: *Re McKenzie v. Ryan*, 6 P.R. 323.

A claim reduced by set-off is the balance of an unsettled amount within this section: *Woodhouse v. Newman*, 7 C.B. 654. Where it does not appear on the face of the proceedings that the amount is unsettled, prohibition may be refused after judgment: *Re Lott v. Cameron*, 29 O.R. 70.

Sub-Section 2. Actions for Principal and Interest on Mortgages, etc.—Prior to the passing of this section in 1897, the decisions as to the right to bring actions for the recovery of the interest due on a mortgage or other instrument, separately from an action for principal then overruled, were somewhat conflicting: see the decision of *Armour, C.J.*, *Ball v. Bell*, 26 O.R. 123, reversed an appeal, 26 O.R. 601: *Re Clark v. Barber*, 25 O.R. 253, overruled, 26 O.R. 47; *McDonald v. Dowdall*, 28 O.R. 212; *Dickenson v. Harrison*, 4 Price 282; *Attwood v. Taylor*, 1 M. & G. 307, and other cases cited *ante* pp. 121, 122. This provision is intended to settle the question and a sum for principal and also a sum for interest thereon may be recovered in separate actions. In *Re Real Estate Loan Co. of Canada v. Guardhouse*, 29 O.R. 602, decided after

s.s. 2 was passed, it was held that while a plaintiff may sue separately for principal and interest due on a mortgage, he must sue for the whole principal or interest and not for portions of either, and that one action cannot be maintained for one instalment of interest when other instalments of interest are due which bring the whole amount beyond the jurisdiction. It was also held in that case that this sub-section applies only to an action brought upon the mortgage by a person to whom the money is payable thereon and not to an action brought by the assignee of the mortgagor upon a covenant entered into by his vendee with him to pay off the mortgage and indemnify him against it. But see *Ball v. Bell*, 26 O.R. 123, 601. See 61 Vic. c. 15, s. 2, (section 247 (b) herein) as to examination of a judgment debtor, on a judgment under this provision.

Due and Payable.—See notes to section 79.

Abandoning Excess.—Where excess is abandoned it shall be done in the first instance in the claim. Where such has not been done the judge may, upon such terms as he shall see fit at any time thereafter but before judgment, permit such abandonment, in which case an entry thereof shall be made in the proceedings: Rule 7. See *Pegg v. Howlett*, 28 O.R. 473; *White v. Galbraith*, 12 P.R. 573; *School Trustees of Nottawasaga v. Township of Nottawasaga*, 15 A.R. 310; *Bodger v. Nicholls*, 28 L.T. 441; *Stoddale v. Wilson*, 8 P.R. 5. The rule gives the judge power to allow the abandonment of the excess at any time before judgment, and the cases in which it was held that the excess must be abandoned in the claim are not now inapplicable: see *McKenzie v. Ryan*, 6 P.R. 323; *Cleveland Press v. Fleming*, 24 O.R. 335.

If the excess is not abandoned the proper course is for the judge to enter judgment for the defendant: *Vines v. Arnold*, 8 C.B. 632. If the judge nevertheless proceeds without abandonment, prohibition may be granted: *McKenzie v. Ryan*, 6 P.R. 323; *Cleveland Press v. Fleming*, 24 O.R. 335; but such prohibition will generally be confined to the excess: *Re Elliott v. Biette*, 21 O.R. 595; *Re Trimble v. Miller*, 22 O.R. 500; *Pegg v. Howlett*, 28 O.R. 473; *Re Lott v. Cameron*, 29 O.R. 70.

The mere fact of the abandonment will not, before judgment, amount to a release. The plaintiff may, if he wish, withdraw the suit and sue for the full amount. If, however, he goes to trial his recovery of the smaller amount will be a bar to any action he may bring to recover the amount abandoned: *Winger v. Sibbald*, 2 A.R. 610.

The abandonment of the excess must be the act of the plaintiff himself, or someone authorized by him, and not the act of the judge: *Hill v. Swift*, 24 L.J. Ex. 137; 3 W.R. 171; nor of the plaintiff's agent at the trial: *Isaac v. Wyld*, 7 Ex. 163. The safer course would be to file an abandonment signed by the plaintiff or someone with authority to sign it for him.

Where the claim was upon a solicitor's bill of costs, part of which had been abandoned, and the judge at the trial taxed off a sum from the bill, it was held that the whole sum should not be deducted from the claim as sued but the amount abandoned should be considered: *Jarvis v. Leggatt*, 10 C.L.T. 155.

The abandonment must be made before judgment. If not so made, prohibition may still be granted. The defendant is entitled to have the plaintiff bound by the abandonment before judgment, so that the adjudication will be final between the parties as to the cause of action in dispute.

80. A judgment of a Division Court upon an action brought for the balance of an account shall be a full discharge.

Judgment
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discharge.

charge of all demands in respect of the account for the balance of which such action was brought, and the entry of judgment shall be made accordingly. R.S.O. 1887, c. 51, s. 78.

A Judgment of a Division Court.—The judgment must, of course, be between the same parties or their privies; *McIntosh v. Jarvis*, 8 U.C.R. 535. In *Winger v. Sibbald*, 2 A.R. 610, it was held that the commencement of a suit in a Division Court for part only of the entire claim and endorsing an abandonment of the balance on the summons is not *per se* a release of the excess, but that the part so abandoned cannot be sued for after the recovery of judgment in such suit. See also *Vines v. Arnold*, 8 C.B. 632; *Nelson v. Couch*, 15 C.B.N.S. 108; *School Trustees of Nottawasaga v. Township of Nottawasaga*, 15 A.R. 310; notes to section 79, title "Abandonment of Excess."

The judge should be particular to order that the judgment be entered for the plaintiff as the section directs, namely: "In full discharge of his cause of action as set forth in the claim." If the plaintiff objects, the defendant is entitled to judgment: see 15 A.R. at p. 320.

Transfer of
actions to
High
Court.

81. When it appears at any stage of an action otherwise of the proper competency of the Division Court that such court has not cognizance thereof on account of the title to land or any corporeal or incorporeal hereditament, or any toll, custom or franchise coming in question, or the validity of any devise, bequest or limitation under a will or settlement being disputed, the action shall not on that account be dismissed, but a Judge of the High Court, or a Judge of the Division Court, in which the action is pending, may order the same to be transferred to the High Court upon such terms as to the payment of costs or otherwise as the Judge making the order thinks fit, and thereafter the action shall proceed in the High Court as if originally commenced therein, and as if the defendant had entered an appearance; or the Judge making the order may give any directions as to procedure which he deems proper. 60 V. c. 14, s. 14.

At Any Stage of an Action.—This section provides for the removal of cases otherwise within the jurisdiction of Division Courts to the High Court, if during the progress of the action, title to land, or to any corporeal or incorporeal hereditament, or any toll, custom or franchise, (section 71, s-s. 4) or the validity of any devise, bequest or limitation under any will or settlement (s-s. 5) comes in question. It does not apply to cases arising under sub-sections 1, 2, 3, 6 and 7, of section 71. As to removal of cases to the High Court where the defence or counter-claim of the defendant involves matter beyond the jurisdiction, see notes to section 76 *ante* p. 116.

It has been held that *certiorari* does not apply to interpleader proceedings: *Ex parte Summers*, 18 Jur. 522; and that an action could not be removed after verdict or judgment had been given: see notes to section 82. But the words "at any stage of an action" may give to this section a wider application than either of the other sections, providing for the removal of cases to the High Court, and may be held to include every period after the issue of the summons until the action is

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finally disposed of, so that if it be necessary to try any of the prohibited questions arising within the section "at any stage of the action" the proceedings may be removed.

The concluding sentence of the section seems to indicate that it is intended to apply to other cases than those in which formal pleadings would be necessary, as the judge making the order for removal to the High Court may direct the mode of procedure to be adopted after the transfer: *e.g.*, a stated case.

A Judge of the High Court.—It is submitted that it will be found to be more convenient in most cases that the application to transfer should be made to the judge of the Division Court.

Upon any question arising at the trial involving the question of title to land, etc., the judge should, if requested so to do, make an order of transfer forthwith. If the judge of the Division Court refuses to make the order, an application may then be made to a judge of the High Court in Chambers: see notes to section 82. The affidavit on such motion should show the refusal of the judge of the inferior court: *Bank of Hamilton v. Baine*, 12 P.R. 439.

After the transfer the jurisdiction of the Division Court judge is at an end and he cannot make any order even as to costs: *Hares v. Lea*, L.R. 10 Eq. 683; 22 L.T. 715; *Harris v. Judge*, (1892) 2 Q.B. 565; *Duke v. Davis*, (1893) 2 Q.B. 107, 260. See notes to section 82.

Directions as to Procedure.—If the order of transfer makes no provision for procedure subsequent thereto, the action will proceed in the High Court as if originally commenced therein and as if the defendant had entered an appearance. See *Davis v. Williams*, 13 Ch. D. 550, and notes to section 76, *ante*. The plaintiff must file a statement of claim as in ordinary cases.

Payment of Costs or Otherwise.—*Fry, J.*, in giving judgment for the plaintiff in an action transferred, made the plaintiff bear the costs of the trial in the court below: *Ward v. Wyld*, 5 Ch. D. 779.

See notes to section 82.

As to clerk's duties on transfer of the action, see rule 182; notes to section 76.

82. In case the debt or damages claimed in an action brought in a Division Court amounts to \$40 and upwards, and in case it appears to any of the Judges of the High Court that the case is a fit one to be tried in the High Court, and in case a Judge thereof grants leave for that purpose, the action may by order of *certiorari* be removed from the Division Court into the High Court upon such terms as to payment of costs or other terms as the Judge making the order thinks fit. R.S.O. 1887, c. 51, s. 79.

Causes may be removed by *certiorari* in certain cases.

Removal of Action by Certiorari.—*Certiorari* cannot be granted unless the amount of the "debt or damages" claimed amounts to \$40 and upwards: see *Solomons v. London C. & D. Ry. Co.*, 10 W.R. 59.

Certiorari pre-supposes jurisdiction in the inferior court, and where a Division Court has no jurisdiction to entertain or try the case, this section will have no application: *Wiltie v. Ward*, 8 A.R. 549; *Ferguson v. Sumpey*, 10 C.L.T. 110; *Whidden v. Jackson*, 18 A.R. 439; *Meyers v. Baker*, *Hargreaves v. Meyers*, 26 U.C.R. 16; *O'Brien v. Welsh*, 28 U.C.R. 394.

A defendant cannot wait and take the chances of a decision in his favor, and finding it adverse, apply for certiorari: *Knight v. Medora*, 11 O.R. 138; 14 A.R. 112; *Black v. Wesley*, 8 U.C.L.J. 277; *Gallagher v. Bathie*, 2 C.L.J. 73; *Holmes v. Reeve*, 5 P.R. 58; and certiorari will not lie after verdict: *Tully v. Glass*, 3 O.S. 149; nor after judgment: *Sherk v. Evans*, 22 A.R. 242; *Douglas v. Hutchinson*, 5 O.S. 341; *Walker v. Gann*, 7 D. & R. 769; *McKenzie v. Keene*, 5 U.C.L.J. 225; and this rule applies to garnishee proceedings under section 190, the garnishee being a party to the proceedings from the beginning, if final judgment has been obtained against the primary debtor, even though the liability of the garnishee has not been determined: *Re Brodericht v. Merner*, 17 P.R. 264; nor where the defendant knows all the facts before a trial but nevertheless argues the case and obtains the opinion of the judge, even though the judge desire it: *Holmes v. Reeve*, 5 P.R. 58. But in some cases, at all events, it seems the order will be made at any time before the matter is finally decided: See *Re East Dulwich Bdg. Socy.*, 39 W.R. 32.

Certiorari does not apply to interpleader proceedings: *Ex parte Summers*, 18 Jur. 522; *Jones v. Harris*, 6 U.C.L.J. 16; *Russell v. Williams*, 8 U.C.L.J. 277; *Finlayson v. Howard*, 1 P.R. 224; nor to replevin: *Muncheon v. Wheatley*, 6 Ex. 88. We have no provision such as section 121 of the English Acts 9 and 10 Vic. c. 95, and 51 and 52 Vic. c. 43, s. 137, for removing actions of replevin by certiorari. But see section 81 and notes thereto.

A justice of the peace, having given notice of objection under section 71, s-s. 7, cannot afterwards move for certiorari: *Weston v. Sneyd*, 1 H. & N. 703. A plaintiff is not entitled to remove his own suit: *Prudhomme v. Lazure*, 3 P.R. 355; *Denniston v. Knox*, 9 U.C.L.J. 241.

Certiorari is too late if delivered to the judge after verdict rendered, and the spirit of the English Statute, 43 Eliz. c. 5, applies when plaintiff's witnesses were sworn and no jury called: *Black v. Wesley*, 8 U.C.L.J. 277. It is too late if the judge has entered upon the hearing of the cause: *Gallagher v. Bathie*, 2 C.L.J. 73; *Barnes v. Cox*, 16 C.P. 236; 2 C.L.J. 67.

Grounds for Certiorari.—A suit was removed by certiorari from the Division Court to one of the superior courts on the ground that a question of law as to the application of the Statute of Limitations would arise on the trial: *Ridley v. Tullock*, 3 U.C.L.J. 14. This case can only have application, we submit, when the Statute of Limitations cannot be fairly discussed or decided in the Division Court. Where a judge has declined to grant certiorari the court will not do so, merely because it appears that possibly a serious question of law may arise, nor merely because the decision in the particular case may be of great importance to the applicant as likely to affect other cases of a similar nature: *Staples v. Accidental Death Ins. Co.*, 10 W.R. 59; see *Batt v. Price*, 1 Q.B.D. 264.

It has been held that certiorari will lie to remove an action when difficult questions of law are likely to arise: *Cataraqui Cemetery Co. v. Burrowes*, 3 U.C.L.J. 47; *Hunt v. The G. N. Ry. Co.*, 2 L.M. & P. 268; *Rees v. Williams*, 7 Ex. 51; *Longbottom v. Longbottom*, 8 Ex. 203; and when the defendant resided in a part of the province far distant from the division in which the action was commenced, and also on account of difficult questions of law: *Nugent v. Chambers*, 3 U.C.L.J. 108. But it is only when the points of law likely to arise are of general importance that certiorari will be granted; it is not enough that they are important to one of the parties: See *Solomon v. London C. & D. Ry. Co.*, 10 W.R. 59; *Staples v. Accidental Death Ins. Co.*, 10 W.R. 59; *Batt v. Price*, 1 Q.B.D. 264; *Munday v. Thames Ironworks Co.*, 19 Q.B.D. 59; *Potter*

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v. G. W. Colliery Co., 10 T.L.R. 380. The order for certiorari is in all cases discretionary and an appeal will only lie for a wrongful exercise of such discretion: See *Banks v. Hollingsworth*, (1893) 1 Q.B. 442. The terms on which the order is granted should not, however, be such as to practically deprive a litigant of his right to the order: *Symons v. Dimsdale*, 2 Ex. 533.

The expression of a wrong opinion by a judge is no cause for removal: *Holmes v. Reeves*, 5 P.R. 58.

After trial and judgment in a Division Court as to the right of a landlord to recover a month's rent under a lease, another action was brought for three months' subsequent rent, whereupon the defendant applied to a judge of the High Court for a certiorari which was refused on the ground that though the case might be of importance as affecting cases of a similar nature that was not in itself sufficient, no difficult questions of law or fact appearing to be involved: On appeal the court refused to interfere with the discretion of the judge as to the granting of the writ, and also on the ground that by the judgment of the Division Court in the first action was *res judicata*: *Fraser v. Orbendorfer*, 36 C.L.J. 101.

Quashing the Writ.—When proceedings in the Division Court have been removed by certiorari into the High Court, a rule or order to set aside the proceedings by any such court for irregularity should be made in the High Court: *Redley v. Tullock*, 3 U.C.L.J. 14.

All material facts should be brought before the court, and where a writ has been obtained without the judge having been informed that the cause had already been heard for several days in the inferior court, the writ was set aside as irregularly issued: *Parker v. B. & E. Ry. Co.*, 6 Ex. 184.

Where the court considered that a defence was not *bona fide* the writ was quashed, although it was sworn that difficult matters of law would arise: *Kenworthy v. Sidebottom* (unreported), C.P.D. 16th May, 1876.

The writ will only be quashed when there is an admission or something tantamount to it, by the party suing it out, that he has done it for the purpose of delay: *Landens v. Sheils*, 3 D.P.C. 90. The order for certiorari may be set aside on the application of the party issuing it when no step has been taken by the opposite party: *Ruffman v. Thornwell* 2 W. W. & H. 51.

Where a certiorari had been issued upon an affidavit stating generally that difficult questions would arise, without stating what those questions were or the grounds upon which they would arise, the court refused to set the writ aside, as it did not appear that those particulars were not pointed out to the judge who granted the order: *Golding v. Cudwell*, 2 L.M. & P. 175.

Where certiorari is regularly issued after a new trial granted, a previous alleged understanding that the cause should be tried in the Division Court is no ground for interfering with a writ: *Heep v. Lucas*, 8 U.C.L.J. 184.

A section in an act taking away certiorari does not apply to the case of a total absence of jurisdiction: *Ex parte Bradlaugh*, 3 Q.B.D. 509. In *Gegg v. Adams*, 9 C.L.T. 311; 10 C.L.T. 2, an order to transfer was refused, but it was imposed upon the plaintiff, as a term in dismissing the appeal, that he should submit it to examination before trial in the Division Court.

Motion for Certiorari.—Application for certiorari must be made by the party himself, either in person or by his attorney, and cannot be made by another person in his name: *R. v. Riall*, 11 Ir. C.L.R. 280. It should be made to a Judge of the High Court in Chambers: *Bowen v. Evans*,

3 Ex. III.; except, by consent of the parties, when it may be made before the Master in Chambers; see C.R. 42 (17); C.R. 1101.

The writ of certiorari has been abolished and an order is now issued instead: C.R. 1101.

For forms of affidavit, notice of motion and order see forms 343, 347 and 348.

The affidavit should be entitled in the High Court: *Es parte Nohro*, 1 B. & C. 267; *Smyth v. Nicholls*, 1 P.R. 355.

Proceedings after Removal.—A judge cannot be attached for disobeying a certiorari unless he acted contumaciously in order to vex the party or to show contempt for the court: *Re Judge of Niagara District Court*, 3 O.S. 347; but see *Mungean v. Wheatley*, 6 Ex. 88, in which it was held that the judge is liable to attachment if he refuses to obey the writ.

The court will not direct how proceedings are to be carried on after removal: *Copping v. McDonell*, 5 O.S. 311; but might direct that the amount of plaintiff's claim be paid into court: *Symons v. Dimsdale*, 2 Ex. 538.

After removal there is no way of compelling the plaintiff to proceed in the higher court: *Dennison v. Knox*, 3 P.R. 150; 9 U.C.L.J. 241; *Garton v. The G.W. Ry. Co.*, 1 E. & E. 258. After removal the plaintiff cannot proceed for a different cause of action than that sued in the court below: *Mason v. Morgan*, 3 P.R. 325; *Hunter v. The G.T. Ry. Co.*, 6 P.R. 67; and a judge has no right to interfere with the case until it goes back to his court by *procedendo*: *Barnes v. Cox*, 16 C.P. 236; *Ewing v. Thompson*, 8 U.C.L.J. 332.

If the plaintiff continues the proceedings, he does not commence *de novo* in the High Court, but delivers a statement of claim reciting the proceedings in the inferior court, and the issue of the certiorari: See *Ashley v. Ashley*, 17 L.T. 265.

Return to Order.—For form of return by judge to certiorari see form 220.

The return should be under seal: *R. v. Kenyon*, 6 B. & C. 640. The original record must be returned. *Askew v. Hayton*, 1 Dowl. 510; *Palmer v. Forsyth*, 4 B. & C. 401.

Where a case is removed from a Division Court of an outer county into the High Court, the papers should be filed in the central office at Toronto; but the venue need not be laid in the County of York: *Chambers v. Chambers*, 3 U.C.L.J. 205 *per* Draper, J. The clerk of the court is required to annex together all the proceedings and papers filed and transmit the same, together with the order of transference, or a copy thereof, to such officer of the High Court as the order directs: Rule 182.

For form of order see form 136, Consolidated Rules, and D.C. form 348.

Costs.—In *Ex Parte G. W. Ry. Co.*, 2 H. & N. 557, the court refused to make it a condition that defendant, if successful, should have no more than inferior court costs.

The order for certiorari entitles defendant to full costs of the High Court if he succeeds in the action without any certificate from the judge who tries the cause: *Corbey v. Roblin*, 5 U.C.L.J. 225. A defendant, however, will not get the costs of removal unless the order provides for them: *Kerr v. Cornell*, 1 C.L.J. 326.

PROCESS AND PROCEDURE.

83. When it is by this Act provided that a claim may be entered, or an action brought, or that any person or persons may be sued in a Division Court, or that an action may be transferred to any other court, such court shall have jurisdiction in the premises, and all proceedings may be had and taken both before and after judgment in or relating to such claim or cause as may now be had and taken, in or relating to any claim or cause which has been lawfully entered in the Court holden for the division in which the cause of action arose, or in which the defendant or any one of several defendants resided or carried on business at the time the action was brought. R.S.O. 1887, c. 51, s. 80.

Court where action may be tried to have full power.

May be Entered.—See section 98 and following sections.

Or Action Brought.—The issue of the first process and the service of it may be considered "bringing an action." Rules 9 and 10.

May be Transferred.—See section 91.

Or Changed.—See section 90.

Such Court.—This refers to the court in which the action may be brought, etc.

Division in which action to be entered.

84. Any action cognizable in a Division Court may be entered and tried in the court holden for the division in which the cause of action arose or in which the defendant or any one of several defendants resides or carries on a business at the time the action is brought, notwithstanding that the defendant at such time resides in a County or division different from the one in which the cause of action arose. R.S.O. 1887, c. 51, s. 81.

In what Court actions may be entered and tried.

Territorial Jurisdiction.—Any action in respect of which the Division Court has jurisdiction may be entered and tried (1) "in the court holden for the division in which the cause of action arose," or (2) "in which the defendant or any one of several defendants resides or carries on business."

What is a Cause of Action.—A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved: *Per* Lord Esher, M.R., *Read v. Brown*, 22 Q.B.D. 131. See notes to section 79.

"Everything which is necessary to make the action maintainable is part of the cause of action:" *per* Maule, J., *Borthwick v. Walton*, 15 C.B. 501. Attention, therefore, has to be paid to the *onus* of proof. If upon the failure of the plaintiff to prove any fact, the defendant would

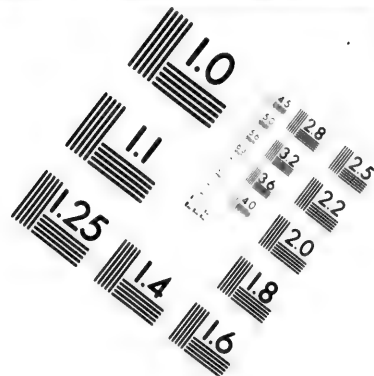
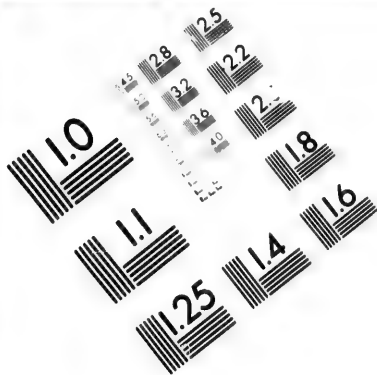
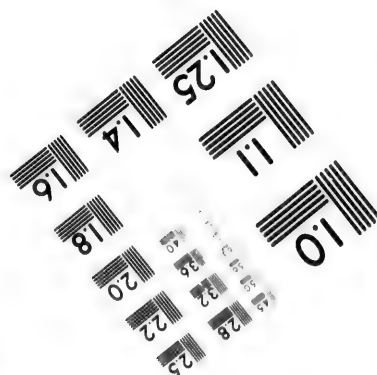
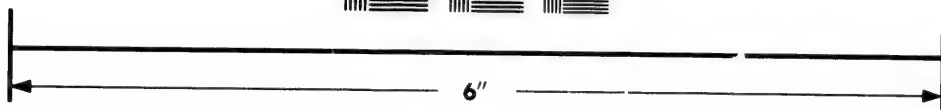
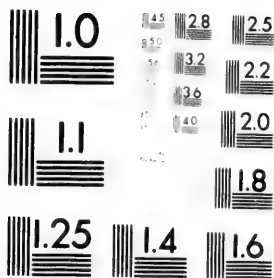


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be immediately entitled to judgment, that fact is part of the cause of action: *per* Fry, L.J., 22 Q.B.D. 132. In an action upon a contract it may be necessary to prove the contract, the performance thereof by the plaintiff and the breach. If all of these facts did not occur in the same division the cause of action did not arise therein and the court for that division would have no jurisdiction: *Watt v. Van Every*, 23 U.C.R. 196; *Noxon v. Holmes*, 24 C.P. 541; *Kemp v. Owen*, 14 C.P. 432; *Carsley v. Fiskin*, 4 P.R. 255. See also *Sichel v. Borch*, 2 H. & C. 954; *Allhusen v. Malyarejo*, 3 Q.B. 340; *Jackson v. Spittall*, L.R. 5 C.P. 542; *Durham v. Spence*, L.R. 6 Ex. 46; *Cherry v. Thompson*, L.R. 7 Q.B. 573; *Vaughan v. Neldon*, L.R. 10 C.P. 47. A contract arrived at by proposal and acceptance is made where it is accepted: *Newcombe v. De Roos*, 2 E. & E. 271; *O'Donohoe v. Wiley*, 43 U.C.R. 350; but see *Green v. Beach*, L.R. 8 Ex. 208. If the parties use the post or telegraph office as a means of communication, the sending by the proposer of his proposal from a place outside the division is no part of the cause of action. "It is as if he were speaking to the person to whom such [letter or] telegram is directed at the place to which he directs it to be sent, and where he intends it to be delivered. The authority to transmit the message when established is merely evidence which goes to fix the sender with the responsibility of sending it, but it is no part of the cause of action:" *per* Hawkins, J., *Cowan v. O'Connor*, 20 Q.B.D. 640, followed in *Noble v. Cline*, 18 O.R. 33; see also *Grundy v. Townsend*, W.N. (1888) 67; *Rennie v. Ratcliffe*, 35 L.T. 833; *R. v. Rogers*, 3 Q.B.D. 28; *Bennett v. Cosgriff*, 38 L.T. 177; *Household Fire Co. v. Grant*, 4 Ex. D. 577; but see *contra*, *Hagle v. Dalrymple*, 8 P.R. 183; *Taylor v. Jones*, 1 C.P.D. 87; *R. v. Holmes*, 12 Q.B.D. 23.

"If I, residing in England, sent down my agent to Scotland, and he makes contracts for me there, it is the same if I myself went there and made them:" *per* Lord Lyndhurst, *Pattison v. Mills*, 1 Dow & Clark, 342 at p. 363; see *Jackson v. Grimley*, 16 C.B.N.S. 380. "Suppose the two parties stood on different sides of the boundary line of the district, and that the order was then verbally given and accepted, the contract would be made in the district in which it was accepted:" *per* Hill, J., *Newcombe v. De Roos*, 2 E. & E. 275. The material fact appears not to be where was the letter written or the agent appointed, but was the proposal written by, or was the party acting as agent, actually the agent of the party with whom the contract completed within the division, was made: see also *Green v. Beach*, L.R. 8 Ex. 208.

The following are illustrations of the application of the rule. In suits for goods sold and delivered the contract must be made, the goods delivered, and the breach, viz., the non-payment, take place, within the same division: *Borthwick v. Walton*, 15 C.B. 501; *Barnes v. Marshall*, 18 Q.B. 785; *Jackson v. Beaumont*, 11 Ex. 300; *Re Walsh*, 1 E. & B. 383; *Kemp v. Owen*, 14 C.P. 432; *Carsley v. Fiskin*, 4 P.R. 255; *Watt v. Van Every*, 23 U.C.R. 196; *Re Elliott v. Norris*, 17 O.R. 78; *Gold v. Turner*, 10 C.P. 149; *Northey Stone Co. v. Gidney* (1894) 1 Q.B. 99.

In an action for a reward the offender was apprehended in one division and convicted in another. The cause of action did not arise in either district: *Hernaman v. Smith*, 10 Ex. 659. In actions on bills, notes or cheques against the drawer, acceptor or maker, the drawing, accepting or making and the dishonor must occur in the same division: *Noxon v. Holmes*, 24 C.P. 541; *Trevor v. Wilkinson*, 31 L.T. 731; *Wilde v. Sheridan*, 16 Jur. 456; 21 L.J. Q.B. 260; *King v. Farrell*, 8 P.R. 119; *Re Olmstead v. Errington*, 11 P.R. 367; *Cooke v. Gill*, L.R. 8 C.P. 107. But when it is unnecessary to prove presentment and dishonor, as where a drawer has no effects in the hands of the drawee, the action is maintainable in the division where the drawing took place: *Wirth v. Austin*, L.R. 10 C.P. 689.

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In an action against an endorser the action cannot be brought in the division in which he writes his name, though the dishonor takes place in that division, if the delivery takes place in another division, as the indorsement is not complete until delivery: *Buckley v. Hann*, 5 Ex. 43; see *Marston v. Allen*, 8 M. & W. 494; *Heath v. Long*, 1 L.M. & P. 333.

Where an agreement between the parties was signed by defendants in Toronto and by plaintiff in Peterborough, the cause of action did not wholly arise in Peterborough: *Re Dunn v. Gourlay*, 17 C.L.T. 415.

The order for goods is a material part of a cause of action for their price: *Borthwick v. Walton*, 15 C.B. 501; *Jackson v. Beaumont*, 11 Ex. 300; and it makes no difference whether the order is in writing or not: *Borthwick v. Walton*, 15 C.B. 501. And where an order was given in Ontario to the traveller of a wholesale merchant in Montreal, "Ship via G.T.R. 1st Sept.," the breach was the non-shipment and not a subsequent refusal by correspondence; therefore, the whole cause of action did not arise where the order was given: *Re Diamond v. Waldron*, 28 O.R. 478. Nor will it be implied in a contract for the sale of goods that the vendor is to send or carry the goods to the vendee; therefore, when a defendant living and doing business in Quebec, enters into a contract to sell and ship goods to the plaintiff doing business in Ontario, it is a contract to be performed in Quebec: *Empire Oil Co. v. Vallerand*, 17 P.R. 27.

In an action for money had and received the receipt must take place within the division: *Re Garland v. Omnium Securities Co.*, 10 P.R. 135; *Rennie v. Ratcliff*, 35 L.T. 833.

In an action on a warranty of a horse, the contract of sale must be made and the warranty given within the division: *Aris v. Orchard*, 6 H. & N. 160. See *Cooper v. Caswell*, 16 Sol. J. 636. Where a solicitor sued a mortgagor for costs of preparing a mortgage for which he received no instructions from the mortgagor, it was held that the consent of the mortgagor to become such was a material part of the cause of action: *Jackson v. Grimley*, 16 C.B.N.S. 380. Where a debt has been assigned, the assignment is a material fact for the plaintiff to prove, and it must, therefore, have been made within the division: *Read v. Brown*, 22 Q.B.D. 128. Where a cause of action is complete before the death of the debtor, the probate of his will is no part of the cause of action: *McCallum v. Gracey*, 10 P.R. 514; but where an action was brought for a legacy against an administrator with the will annexed, the cause of action was held not to be complete without proof of the letters of administration: *Re Fuller v. Mackay*, 2 E. & B. 573. An admission made within the jurisdiction, if sufficient to state an account, will give jurisdiction: *Grundy v. Townsend*, W.N. (1888) 67. In an action against a railway company for illegally putting a passenger off a train, the cause of action arises at the place of putting off, and not where the ticket was issued: *Ralph v. G.W. Ry. Co.*, 14 C.L.J. 172; see *Canada Southern Ry. Co. v. Gebhard*, 109 U.S. 527. In an action for witness fees, the cause of action comprises the service of the subpoena and the attendance at court: *Whitehead v. Burt*, 7 T.L.R. 609.

Where Defendant Resides.—"What is the meaning of the word 'resides'? I take it that that word, where there is nothing to show that it is used in a more extensive sense, denotes the place where an individual eats, drinks and sleeps, or where his family or his servants eat, drink and sleep;" *per Bayley, J.*, *R. v. North Curry*, 4 B. & C. 959. "Usual place of residence" means the dwelling in which he lives with his family and sleeps at night: *R. v. Hammond*, 17 Q.B. 772; *Grogan v. London & M. Ins. Co.*, 53 L.T. 761. It is an "ambiguous word," and may receive a different meaning according to the statute in which it is found: *per Cotton, L.J.*, *Re Bowie*, *Ex parte Breull*, 16 Ch.D. 484. Ordinarily, men

are supposed to reside where their wives and families do, but this is not always correct. A man may reside in one place and his wife and family in another: *Cartwright v. Hinds*, 3 O.R. 384, 395 and cases cited. *Cockburn, C.J.*, in *Wellington v. Whitechurch*, 4 B. & S. 106, said, the maxim: "that a husband's domicile is where his wife lives, applies only where a man is generally in one place and occasionally elsewhere." That is the general rule, but in the interpretation of the meaning of these words every case must depend upon its own circumstances.

A person who has no permanent place of abode "dwells" at the place at which he may be temporarily residing: *Alexander v. Jones*, L.R. 1 Ex. 133. The domicile of the husband is that of the wife: *Macdonald v. Macdonald*, 5 U.C.L.J. 66. Defendant worked in the Province of Quebec, but his wife and family lived across the river in Ontario, where his wife kept a store, and where he often came to see her. Held, that defendant's residence was with his family, and that he was subject to be sued in the proper Division Court in Ontario: *Re Ladouceur v. Salter*, 6 P.R. 305. Where a man having his permanent residence at one place, has a lodging, for a temporary purpose, at another place, held that he does not "dwell" at the latter place: *Macdougall v. Paterson*, 11 C.B. 755. In the argument and from the remarks of Maule, J., at p. 763 of the report in this case, it appears to have been taken for granted that "residence" and "dwelling" were synonymous. The same view was taken by *Cockburn, C.J.*, in *Butler v. Ablewhite*, 6 C.B.N.S. 747. A temporary or compulsory residence, at the time of the commencement of the action, in gaol does not constitute the place of dwelling of the party: *Dunston v. Paterson*, 5 C.B.N.S. 267.

The residence must be of a permanent character, and not merely for a temporary purpose: *Marsh v. Conquest*, 17 C.B.N.S. 418.

A man may have two permanent places of residence, and the question of jurisdiction must depend on the fact "where his actual residence, at the time of action brought was:" *per Cockburn, C.J.*, *Butler v. Ablewhite*, 6 C.B.N.S. at p. 747; *Pilgrim v. Knechtbull*, 18 C.B.N.S. 798. See also *Kerr v. Haynes*, 2 L.T. 11; *Bailey v. Bryant*, 1 E. & E. 340.

A company is only "domiciled or ordinarily resident" where its head office is: *Jones v. Scottish Accident Ins. Co.*, 17 Q.B.D. 421, and cases there cited: *Watkins v. Scottish Imperial Ins. Co.*, 23 Q.B.D. 285.

Where a railway company had their principal office in London and a station at A. Held that they carried on business in London, not at A.: *Shields v. G.N. Ry. Co.*, 7 Jur. N.S. 631; and 8 U.C.L.J. 195. A corporation has been held to dwell where its business is carried on: *Taylor v. Crowland Gas, etc., Co.*, 11 Ex. 1.

The G.W. Ry. Co., has its principal station at Paddington, where the directors meet, the secretary resides, and general meetings are held, and whence orders emanate. Held, that the company "dwells" at Paddington within the meaning of 9 and 10 Vic. c. 95, s. 128: *Adams v. G.W. Ry. Co.*, 6 H. & N. 404; and this decision has been followed in *Ahrens v. McGilligat*, 23 C.P. 171; *Westover v. Turner*, 26 C.P. 510. See also *Oldham B. & M. Co. v. Heald*, 3 H. & C. 132; *Palmer v. Caledonian Ry. Co.* (1892) 1 Q.B. 823.

It is no objection to the jurisdiction that the defendant has become resident within the division for the very purpose of giving jurisdiction; provided that the residence was actual and *bona fide* and not colorably and collusively acquired before issuing the summons: *Massey v. Burton*, 2 H. & N. 597; *Baker v. Wait*, L.R. 9 Eq. 103. But a plaintiff cannot by making a person, who is in his interest, and who resides within the jurisdiction of a certain Division Court, a defendant in a suit for the purpose of giving that court jurisdiction: *Baker v. Wait, supra*. The case of *Bridges v. Douglas*, 13 C.L.J. 358, is at variance with the above case, but

it must be observed that the attention of the learned judge (Morison, J.), who decided *Bridges v. Douglas*, was not called to the English case above referred to. It seems to the writer that to give jurisdiction in such a way would not only be a fraud on the other defendants, but on the statute itself.

A company for the manufacture and sale of goods, however, "dwells" at the place of manufacture and sale, and not at its registered office, and is distinguished, in this respect from a railway company; *Keynsham B. L. Lime Co. v. Baker*, 2 H. & C. 729.

But a building contractor "carries on his business" where his general place of business is, and not at the locality where particular contracts are being executed; *Gorslett v. Harris*, 29 L.T.O.S. 75.

A joint stock company "dwells" where the substantial business of the company and its negotiations are carried on, and not necessarily in the locality where its property is situated and its immediate objects carried on; *Aberystwith Pier Co. v. Cooper*, 13 L.T. 273. *Cockburn, C.J.*, said, the company "cannot be said to dwell at the pier at Aberystwith."

A railway company having its head office in Montreal with lines traversing the Dominion from one end to the other, with numerous stations on the line where it traverses every province at each of which some of their business is done is resident in each province in which the line of their railway runs: *Tytler v. The C.P. Ry. Co.*, 29 O.R. 654; 26 A.R. 467, *per Burton, C.J.O.* at p. 469, *per Osler, J.A.* at p. 472.

A foreign corporation established by foreign law which sets up an office within the jurisdiction, and carries on a principal part of its business here, ought to be considered as resident here as if established by our law: *Huggin v. Comptoir d'Escompte de Paris*, 23 Q.B.D. 519; *Badeock v. Cumberland Gap Park Co.*, 9 T.L.R. 113; *Newby v. Von Oppen, etc.*, Co., L.R. 7 Q.B. 293; *Palmer v. Gould Mfg. Co.*, W.N. (1884) 65; *La Burgogne* (1899) P. 1.

Where a Defendant Carries on Business.—The phrase "carrying on," implies a repetition or series of acts: *per Brett, L.J.*, *Smith v. Anderson*, 15 Ch.D. 247. See also *Re Siddall*, 29 Ch.D. 1; *Crowther v. Thorley*, 48 L.T. 644; *Re Thomas*, 14 Q.B.D. 379; *Harris v. Amery*, L.R. 1 C.P. 148.

To "carry on" business means, primarily, to carry on one's own business; therefore it cannot be said in reference to a salaried clerk "that he carries on business" at the place where his employer's office is: *Lewis v. Graham*, 20 Q.B.D. 780; s.c. sustained, 22 Q.B.D. 1; *Buckley v. Hann*, 5 Ex. 43; *Sangster v. Kay*, 5 Ex. 386; *Le Tailleur v. S.E. Ry. Co.*, 3 C.P.D. 18; *Detroit Soap Co. v. Thatcher*, 15 C.L.T. 161.

"The business must be some business in which he has control, or acts as one of the partners engaged in carrying it on," and "a particular clerk or workman who is engaged about the business, but has no control over it whatever, cannot be said to carry on business;" *per Coleridge, C.J.*, *Lewis v. Graham, supra*. A clerk in the Admiralty does not "carry on business" at his office within section 40, London Small Debts Act: *Buckley v. Hann*, 5 Ex. 43, nor does a deputy sealer in the Court of Chancery: *Rolfe v. Learmonth*, 14 Q.B. 196; nor a clerk in the Privy Council office: *Sangster v. Kay*, 5 Ex. 386; nor a partner in a mine on the cost-hook principle, the business of which is wholly carried on by an agent: *Mitchell v. Hender*, 18 Jur. 430.

But there is no principle of law which decides what "carrying on" trade is; a multitude of circumstances make up what is called "carrying on" a trade, for it is a compound fact made up of a variety of things: *per Jessel, M.R.*, *Erichsen v. Last*, 8 Q.B.D. 414; not a few isolated business transactions. See *Salter v. St. Lawrence Lumber Co.*, 28 N.S.R. 335.

A firm carrying on business in Scotland, with a branch office within the jurisdiction of a County Court in England, were sued in the firm's name, and the summons was served at the branch office: *Held*, that the firm "carried on business" within the jurisdiction: that the service was good, and that the County Court Judge was wrong in declining to exercise jurisdiction; that if the service had been bad, it amounted to a mere irregularity, which might be waived by the conduct of the defendants: *Weatherly v. Calder*, 61 L.T. 508.

The words "carries on business" were said by Coleridge, J., in *Rolfe v. Learmouth*, 14 Q.B. 199, to mean "some fixed place at which the party's business is carried on, at least for a certain time."

A surgeon and apothecary, who occupies a position similar to that of a general medical practitioner in this country, has been held to "carry on business" where he daily attends patients, although resident out of it: *Mitchell v. Hender*, 18 Jur. 430.

A railway company "carries on business" only at its principal office where the directors meet and the general business of the company is transacted: *Minor v. Lon. & N.W. Ry. Co.*, 1 C.B.N.S. 325; *Brown v. L. & N.W. Ry. Co.*, 4 B. & S. 326; *LeTailleur v. S.E. Ry. Co.*, 3 C.P.D. 18; *Shields v. The G.N. Ry. Co.*, 7 Jur. N.S. 631, and 8 U.C.L.J. 195; *Ahrens v. McGilligat*, 23 C.P. 171; *Pearson v. C.P. Ry. Co.*, 1 West. L.T. 47; *Westover v. Turner*, 26 C.P. 510. In the latter case it was also held that the fact of the railway company having in addition to its local station, a factory for the making and repair of the rolling stock used on the road, and employing a number of workmen therein, did not bring such place within the statute.

A benevolent society whose head office is not fixed by charter or by statute, "carries on business" at the place where its chief officer resides and transacts their financial business: *Franklin v. Owen*, 15 C.L.T. 105.

By the appointment of a general agent to do business in a place, a corporation cannot be held to be carrying on business there. The question is whether the person doing business is the servant of the defendant: *Corbett v. The General Steam Nav. Co.*, 4 H. & N. 482. Where an agent had a firm's name affixed to his office, and their note paper contained a heading referring to his office as their London address, but his authority was limited, it was held that the firm did not carry on business at his office: *Baillie v. Goodwin*, 33 Ch.D. 604; *Grant v. Anderson*, (1892) 1 Q.B. 108.

As to notice disputing the jurisdiction, see section 176 and notes thereto.

Where there are defendants having separate and not joint interests: see rule 19 and notes to section 101.

When defendant resides out of Ontario: see section 87.

Actions
may be
brought and
tried in the
Court
nearest to
the defend-
ant's resi-
dence.

85.—(1) Such action may be entered and tried and determined in the Court the place of sitting whereof is the nearest to the residence of the defendant, and the action may be entered, tried, and determined irrespective of the place where the cause of action arose, and notwithstanding that the defendant at the time resides in a county or division other than the county or division in which the Division Court is situate, and the action entered. R.S.O. 1887, c. 51, s. 82 (1).

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(2) It shall be sufficient if the summons in such case be served by a Bailiff of the Court out of which it issues, in the manner provided in section 100 of this Act; and upon judgment recovered in any such action a writ of *fieri facias* against the goods and chattels of the defendant, and all other writs, process and proceedings to enforce the payment of the judgment, may be issued to the Bailiff of the Court, and be executed and enforced by him in the County in which the defendant resides, as well as in the County in which the judgment was recovered. R.S.O. 1887, c. 51, s. 82 (2).

Service of
summons
in such
cases.

Execution.

Nearest to the Residence of the Defendant.—See notes to section 93. It is the *place of sitting*, not the residence of the clerk or the place where he has his office, which determines the right to bring the action under this section.

As to what is the place of sitting: see *Malcolm v. Malcolm*, 15 Gr. 13; *Moffatt v. Carleton Place Board of Education*, 5 A.R. 202. See also section 8 and notes thereto.

As to place of residence: see notes to section 84. Rule 5 provides that the plaintiff must state in his claim that he enters the suit and desires to have it tried because the place of sitting is nearest to the defendants' residence: Form 17. This section does not apply where there is more than one defendant, unless the condition of the operation of the section as to residence applies to all of them: *Re Sinclair v. Bell*, 28 O.R. 483; see *Hill v. Hicks*, 28 O.R. 390. But in an action against partners, one of whom was out of Ontario, the action could have been brought against the one residing nearest to the court in which the summons was issued: *Re Sinclair v. Bell*, *supra*. See sections 110, 111 and notes to section 86.

The distance is measured as the crow flies: *Moulet v. Cole*, L.R. 8 Ex. 32; *Duignan v. Walker*, 5 Jur. N.S. 976; *Atkins v. Kinnier*, 4 Ex. 776; and the word "nearest," has been held to be synonymous with next: *Smith v. Campbell*, 19 Ves. 400. See also *Bathard v. London Sewers Co.*, 54 J.P. 135.

Insurance Premium Notes.—The R.S.O. c. 203, s. 138, "The Ontario Insurance Act," provides: "Any action cognizable in a Division Court upon or for any premium note or undertaking, or any sum assessed or to be assessed thereon, may be entered or tried and determined in the court for the division wherein the head office or any agency of the company is situate where and where only within the body of such note or undertaking or across the face thereof, there was at the time of the making or entering into the same, printed in conspicuous type, and in ink of a color different from any other in or on such note the words following: 'Any action which may be brought or commenced in a Division Court in respect or on account of this note or undertaking, or any sum to be assessed thereon, may be brought and commenced against the maker hereof in the Division Court for the Division wherein the head office or any agency of the company is situate.'" It was held that the corresponding section of the R.S.O. 1877, c. 161, s. 71, now repealed, did not apply to the suing of a premium note taken under the 46th section of that Act for the cash payment on the insurance: *The Canada Farmers' M. Ins. Co. v. Welsh*, decided in 1876 (not reported) *per* Hagarty, C.J.

Building Societies.—The Loan Corporations Act, R.S.O. c. 205, s. 11, provides that in actions for instalments of terminating shares if the amount in arrear does not exceed \$100, the action may be brought in the Division Court of the Division wherein the head office or chief agency of the society is situated.

The whole amount in arrear for calls must be included in one action: see section 79 and notes thereto.

When actions may be brought in other than the regular divisions.

86 In case a person desires to bring an action in a division other than as in the next preceding two sections mentioned, a County Judge may by special order authorize an action to be entered and tried in the Court of any division in his county adjacent to the division in which the defendant or one of several defendants resides, whether such defendant resides in the County of the Judge granting the order or in an adjoining County. R.S.O. 1887, c. 51, s. 83.

Leave to Bring in Adjacent Division.—Leave to bring an action under this section may be granted by the judge on production of an affidavit (form 23), and in the summons it shall be stated, "Issued by leave of the judge": Rule 14.

The order must be granted by the judge before whom the action is to be tried under the order: Rule 22. Leave should be granted *ex parte*: *Re Trust and Investment Corporation of South Africa*, (1892) Ch. 332. The order under this section may be made at any time, and on an application for prohibition it was held that if prohibition were granted the case would still remain subject to the power of the judge to make the order, and as it had been tried on its merits prohibition was refused: *Re Sinclair v. Bell*, 28 O.R. 483.

No leave shall be granted to bring a suit in a division other than the one *adjacent* to the division in which the party sued resides, but the division may be in the same or an adjoining county: Rule 22. The word "adjacent" here means "contiguous or bordering upon": see *Kingsmill v. Millard*, 11 Ex. 313; *Earl of Lisburn v. Davies*, L.R. 1 C.P. 259, and *per Erle C.J.* at p. 264.

Actions when defendant resides out of the province.

87.—(1) When it is by this Act provided that a claim may be entered, or an action brought, or that any person or persons may be sued in a Division Court, such action may be brought, notwithstanding that the residence of the defendant is, at the time of bringing the action, out of the Province of Ontario, and such action may be brought in the Division Court of the division in which the cause of action arose or partly arose, and continued to completion in as full and effectual a manner as might have been the case if the defendant resided in the Province. 57 V. c. 23, s. 12; 60 V. c. 14, s. 12.

Service of summons on non-residents.

(2) The service of the summons in any such case may be made by a Bailiff of the Court out of which it is issued, or by some competent person, who may, either before or after the service, be approved by the Judge or the Clerk of the Court for that purpose, but such summons shall be served at least fifteen days before the return day thereof. 57 V. c. 23, s. 13.

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(3) The necessary affidavit of service, if not made before a Division Court Clerk, or a Commissioner for taking affidavits in the Province, may be sworn before any Notary Public in the country in which such service has been made, and such affidavit shall be held to be as effectual as if made by a Bailiff of the Court, before the Clerk. 57 V. c. 23, s. 14.

Proof of
service.

(4) In any case in which service of the summons on the defendant has been effected out of Ontario, the Judge may, upon application to him, allow, as costs in the cause, a sum of money towards the expenses incurred in effecting such service, but such allowance shall not in any case exceed in the whole five dollars. 60 V. c. 14, s. 13.

Allowance
for service
out of
Ontario.

When it is by this Act Provided.—The introductory words of this section refer to a claim or an action of the proper competence of a Division Court, and not to an action against a defendant resident out of the jurisdiction. In a recent case it was contended that whatever may have been the intention of the Legislature, the section failed in the accomplishment of its object, because the words used refer to the action against the defendant resident out of the jurisdiction, and nowhere in the Act is provision made for such action, and nowhere, except in sections 89 and 95, is it provided "that a claim may be entered or an action brought," etc., and these sections clearly have no application. But it was held that the words "an action brought," etc., or claim "entered," etc., mean simply an action of the proper competence of a Division Court, and therefore an action against a defendant residing in Montreal for an amount, with the competence of section 72, sub-section 1 (c), should have been brought in the Division Court: *Hicks v. Jacob*, 19 C.L.T. 88.

Out of the Province of Ontario.—This section, as originally introduced by 57 Vic. c. 23, s. 12, applied only to cases which arose wholly within the limits of some Division Court: see *Bicknell & Senger*, 1st ed. vol. 2, p. 388; *Franklin v. Owen*, 15 C.L.T. 185. But in the revision of the statutes it has been amended so as to include cases in which the cause of action "partly arose within same division." If no part of the cause of action rose anywhere in Ontario, the court would have no jurisdiction, and a defendant would, perhaps, not be required to file a notice disputing the jurisdiction under section 205: see *Knight v. Medora*, 14 A.R. 112, *per Patterson, J. A.*, at p. 113; and *per Osler, J. A.*, p. 116, following *Mead v. Creary*, 32 C.P. 1.

All of these cases could, however, be supported on the principle that the notice is only necessary where the consent of parties could not give jurisdiction. The failure to give notice disputing the jurisdiction may be construed as consent to jurisdiction. If a defendant resident out of the jurisdiction, and over whom the court would not otherwise have jurisdiction, appears and defends an action, such appearance is a waiver of any objection to the jurisdiction, and a judgment recovered against him in any such action is binding upon him: *Warriner v. Kingsmill*, 8 U.C.R. 107; *Bevin v. Bletcher*, 23 U.C.R. 28; *Re Guy v. G. T. Ry. Co.*, 10 P.R. 372; *Beaty v. Cromwell*, 9 P.R. 547; *Sears v. Meyers*, 15 P. It. 381; but if the defendant was not at, or during the time proceedings were taken to recover the judgment, a resident of or domiciled within the province, and did not appear therein, the judgment would have no effect outside of the province: *Schibbsby v. Westenholz*, L. R. 6 Q.B. 155; *McLean v. Shields*, 9 O.R. 699. But if by agreement he had submitted

himself to the courts of this province, the judgment would be binding upon him: *Copin v. Adamson*, L.R. 9 Ex. 345; 1 Ex. D. 17.

If the defendant is a corporation having its head office out of the province, and the cause of action partly arose in one division and partly in another, the action may be brought in either division: section 88.

Garnishee Proceedings.—In *Franklin v. Owen*, 15 C.L.T. 105, garnishee proceedings were taken under section 185, against a primary debtor residing in the United States, the garnishees being a benevolent society, whose head office was not fixed by charter or by statute. The Division Court judge held that the court of the division in which the chief financial officer of the society resided and transacted the business of the society had jurisdiction, notwithstanding that the cause of action arose elsewhere and that the primary debtor resided elsewhere, and also that such court had jurisdiction notwithstanding the residence of the primary debtor outside of Ontario. On application for prohibition this decision was overruled and prohibition granted on the ground that the statute, as then expressed, gave jurisdiction in a case where the defendant resided out of the province of Ontario only to the division in which the cause of action arose, that this section was not intended to apply to a garnishee plaintiff at all, and even if it did it was not to be construed in the manner contended for by the primary creditor: *per Street, J., Re Franklin v. Owen*, 15 C.L.T. 158, affirmed on appeal, 15 C.L.T. 185. Since then, in the revision of the statutes, this section has been extended to cases in which the cause of "partly arose" in any division, and probably if the garnishee resided or carried on business in any such division garnishee proceedings might be instituted. It does not appear that a Division Court has power to adjudicate on a garnishee plaintiff against a garnishee resident out of the province except in cases under sections 187 and 190, where the garnishees are a "body corporate not having their chief place of business within the province": see *Parker v. Odette*, 16 P.R. 69; *Boswell v. Piper*, 17 P.R. 257; *Braum v. Davis*, 14 C.L.T. 194; 9 Man. L.R. 534; *Canada Cotton Co. v. Parmallee*, 13 P.R. 308. And see notes to sections 179, 187 and 190.

But a bank authorized by Parliament to do business in Ontario, although its head office is out of the province, is deemed potentially and actually resident within the jurisdiction of Ontario for the purposes of the law as well as for the transaction of its business: *County of Wentworth v. Smith*, 15 P.R. 372.

Service of Summons.—Sub-section 1 of this section would authorize service of the summons to be made in a foreign country on a defendant residing there at the time of bringing the action. The provision made here for such service would appear to be superfluous. If the service were made by any literate person it would be valid. Section 107 provides for service of process elsewhere than in the division in which the action is brought. Though the bailiff is made responsible for the service of all process he is not bound to serve documents unless they are to be served in or near to his division, and under section 54 he is not entitled to mileage beyond the limits of his county: see notes to sections 54, 107 and 108. Under this sub-section he may go to any distance outside of the jurisdiction for the purpose of serving the summons, but by sub-section 4 the cost of such service is restricted to a sum not exceeding \$5. The bailiff would be entitled to charge 12c. per mile under item 7 of the Tariff of Bailiffs' Fees up to that amount, but no more.

When Defendant a Foreigner.—Service of process on a foreigner in a foreign country may involve unpleasant questions: *Cookney v. Anderson*, 1 D.J. & S. 365. The Consolidated Rules provide that in actions in the High Court notice of the writ, and not the writ itself, shall be served: see *Beddington v. Bedington*, 1 P.D. 426; *Henderson v. Hall*, 8 P.R. 355.

Affidavit of Service.—The object of this clause and its restriction of the authority of persons to take affidavits of service out of the province to notaries public is not apparent. Section 149 authorizes the making of affidavits before other persons than those here enumerated, and section 37 of R.S.O. c. 73, provides that oaths, affidavits, affirmations or declarations administered, sworn, affirmed or made out of the province of Ontario before numerous persons, other than notaries public, shall be valid and effectual for the purposes of and in or concerning any cause, matter or thing depending or in anywise concerning any proceedings in any courts in this province. All other affidavits are therefore good if made under the provisions of section 149, or of section 37 R.S.O. c. 73, except an affidavit of service under this section of the Division Courts Act, which will only be effectual if made before a Division Court clerk or a commissioner for taking affidavits in this province, or before a notary public when sworn anywhere outside the limits of this province.

Substitutional Service.—Under this section substitutional service could not be ordered in any case in which it has been improper to do so under section 104: see notes to that section.

At Least Fifteen Days.—The return day of the summons could very properly have been left to the discretion of the judge. To allow only fifteen days where the service is to be made in distant countries would clearly be insufficient. The provisions of this section were no doubt originally suggested by transactions arising from the relations existing between residents on either side of the borders of the province and were intended to meet such cases.

As to computation of time see notes to section 41.

88. In every case where the defendant is a corporation not having its head office in the Province, and the cause of action arose partly in one division and partly in another, the plaintiff may bring his action in either division. R.S.O. 1887, c. 51, s. 84.

Where defendant is a corporation the head office of which is not in province.

Foreign Corporations.—In any action against a foreign corporation, not having its head office in Ontario, the claim must be entered and the action brought, under this section, in the court of one of the divisions in which the cause of action partly arose. This provision is intended to overcome the difficulty which formerly prevented such corporations from being proceeded against when the cause of action did not arise in any one division. The service of the summons may be effected in the same way as an ordinary summons for service on a corporation not having its head office in the province, as to which see section 105.

89. Where the debt or money payable exceeds \$100, and is by the contract of the parties made payable at a place out of the Province of Ontario, the action may be brought thereon in any Division Court, subject, however, to the place of trial being changed upon the application of one or more of the defendants as provided by the next succeeding section. R.S.O. 1887, c. 51, s. 85.

Where money made payable out of the province.

Debt or Money Payable.—See notes to section 90.

Out of the Province of Ontario.—Where a note, for instance, is made payable at Montreal it could be sued in any Division Court in Ontario if

the amount exceeds \$100, and if in other respects the Division Court had jurisdiction. It would also be suitable where the defendants, or one of them, resided.

Next Succeeding Section.—See notes to section 90.

Place of
trial where
amount
sued for ex-
ceeds \$100;
changing
place of
trial in
such cases.

90.—(1) Where the debt or money payable exceeds \$100, and is made payable by the contract of the parties at any place named therein, the action may be brought thereon in the Court holden for the division in which the place of payment is situate, subject, however, to the place of trial being changed to another division in which the Court holden therein has jurisdiction in the particular case.

(2) To procure such change an order to that effect shall be obtained by the defendant from the Judge of the County in which the action is brought.

(3) The application for the order shall be made within eight days from the day on which the defendant who makes the application was served with the summons, where the service is required to be ten days before the return; or within twelve days after the day of such service, where the service is required to be fifteen days or more before the return.

(4) The application shall be on affidavit that the applicant intends to defend the action, that he has a good defence upon the merits, that the cause of action did not wholly arise in the division in which the action is brought, and that the witnesses for the defence, or some of them, reside within the division in which the defendants, or one of them, resided or carried on business at the time the action was brought, and that the application is not made for the purpose of delay; the date of the next two sittings of the Court to which it is sought to have the cause transferred shall also be shown.

(5) The affidavit shall be made by a defendant, or in case satisfactory reasons are shown for the same not being made by a defendant, then by the solicitor or agent of a defendant.

(6) The order shall direct at what sittings of the Court the action shall be tried, subject to all rights of postponement as in other cases, and shall be attached to the summons and other proceedings in the action by the Clerk, who shall forthwith transmit the same to the Clerk of the Court in which the action is by such order directed to be tried, and enter a minute thereof in his procedure book.

(7) Upon receipt of the order and other papers by the Clerk of such last mentioned Court, he shall enter the action and proceedings in his procedure book.

(8) All the papers and proceedings in the cause thereafter shall be entitled and had and carried on as though the action had originally been entered in the said last mentioned Court.

(9) It shall be the duty of the defendant obtaining the order forthwith to serve, or cause to be served, a copy of the same upon the plaintiff or his agent in the same manner as summonses are required to be served under this Act. R.S.O. 1887, c. 51, s. 86.

[As to actions on insurance premium notes and assessments, see Chap. 203, Sec. 158.]

Debt or Money Payable.—This and the next preceding section are only applicable to such claims as are suable under section 77, sub-section 1 (d). The "debt" must amount to \$100. When a note was given for \$99 and at the time of suit \$24 interest had accrued, it was held that the suit did not come within this section. The \$24 was not payable except as damages: *Re Brazil v. Johns*, 24 O.R. 209.

The words "debt or money payable" are not identical with those used in that sub-section, but they mean substantially the same.

Any Place Named Therein.—Any form of words employed by the parties which reasonably indicate a particular place of payment would be within this section. A bill or note payable "at the Bank of Montreal, Toronto," or at the office of the payee or any other person in any particular place, without further words of designation, would be within the section.

May be Brought.—The plaintiff has the option of bringing the action in the court for the division in which place of payment is situate. See Interpretation Act, section 8, (2); *R. v. Bishop of Oxford*, 4 Q.B.D. at p. 554; *Cameron v. Wait*, 3 A.R. 175, *per* Harrison, C.J. The general jurisdiction of the court is unaffected by this section.

Jurisdiction in the Particular Case.—As to jurisdiction in each particular case, see notes to section 84.

Where a Division Court becomes seized of the right to entertain a claim under this section, it would possess that right until the close of the case: *Haldan v. Beatty*, 43 U.C.R. 614.

Sub-Section 2.—The application is to be made by the defendant, or, if there be more than one, by or on behalf of all, to "the judge of the county in which the action is brought." The clerk would be entitled to the same fees, of and about the order, as he would in other matters.

Sub-Section 3.—The application must be made within eight days from the day of service of the summons, when the defendant, or one of the defendants, resides within the county in which the action is brought, or within 12 days if none of the defendants reside within such county. The judge has no power to enlarge this time: *Serjeant v. Dale*, 2 Q.B.D. 558; *Hudson v. Tooth*, 3 Q.B.D. 46; *Barker v. Palmer*, 8 Q.B.D. 9, reported more fully in 30 W.R. 59; see *R. v. Murray*, 27 U.C.R. 134; *R. v. The G. W. Ry. Co.*, 32 U.C.R. 506; and cases cited 9 P.R., p. 236; *Grant v. Holland*, W.N. (1880) 156; *Ex parte Luxon*, *Re Pidsley*, 20 Ch. D. 701; *Re West Simeon*, 1 E.C. 128; *Re McLean v. Osgoode*, 30 O.R. 430.

"Within" so many days from or after an event means exclusive of the day of service: *Williams v. Burgess*, 12 A. & E. 635; *Robinson v. Waddington*, 13 Q.B. 753; *Mitchell v. Foster*, 12 A. & E. 472; *Stroud*, 889; *Radeliffe v. Bartholomew*, (1892) 1 Q.B. 161. See also *Kennedy v. Pureell*, 14 S.C.R. 453, as to computation of time.

For instance, if a summons was served on the 10th day of the month, the 18th and 22nd would respectively be the last days for the application. If the last of such days fell on a holiday, then the application could be made on the following day: *Inter. Act*, section 8, (17).

Should the judge be away from home and the defendant be unable, for that reason, to apply on the last day, it would be sufficient for him to leave the papers, on which he rested his application, with the clerk or at the judge's Chambers within the proper time, and then his application could be considered as "made." See *R. v. Allen*, 4 B. & S. 915; *Berridge v. Fitzgerald*, L.R. 4 Q.B. 639; *Bain v. Gregory*, 14 L.T. 601; *Lewis v. Calor*, 1 F. & F. 306; *Hughes v. Griffiths*, 13 C.B.N.S. 334; *Mumford v. Hitchcocks*, 14 C.B.N.S. 361; *Christopher v. Croll*, 16 Q.B.D. 66; *Re Sweetman and Gosfield*, 13 P.R. 293; *Harris v. Meyers*, 16 Gr. 117.

Requisites of Affidavits.—The formal requirements of affidavits generally in Division Courts are regulated by rules 262 to 269, inclusive. An affidavit must contain the words "make oath," for, although the jurat certifies that the deponent was sworn, it will not be sufficient unless the affidavit states that he makes oath: *Allen v. Taylor*, 10 Ex. 52. It should be divided into paragraphs and numbered consecutively, and should state concisely the sources of knowledge or belief: Rules 263, 265.

The affidavit of a solicitor's managing clerk is insufficient unless it states he has some particular charge of the writ: *Elmsley v. Cosgrove*, 6 P.R. 164. If the sources of knowledge are not given it is necessary to distinguish between facts within the knowledge of the deponent and those believed by him, and in the one case to set forth his means of knowledge, and in the other, the sources of information: Rule 265.

Affidavits should be drawn up in the first person and should state the name in full of the deponent, and his description and true place of abode: Rule 263. An affidavit sworn in the United States, though expressed in the third person, was received: *Re Husband*, 12 L.T. 403.

An affidavit giving only the initials of deponent's second name is regular: *De Forrest v. Bunnell*, 15 U.C.R. 370.

Should the parties be described in the summons by initials or by a wrong name, the affidavit may also use such initials or wrong name: *De Forrest v. Bunnell*, 15 U.C.R. 370; *Sims v. Prosser*, 15 M. & W. 151; *Hodgson v. May*, 7 D. & L. 4; *R. v. Sheriff of Surrey*, 8 Dowl. 570; *Beauchamp v. Cass*, 1 P.R. 291. The deponent should sign his usual signature, and if he does so it is no objection that it does not correspond with the name given in the affidavit: *Folger v. McCallum*, 1 P.R. 352; *Hands v. Clements*, 11 M. & W. 815.

The signature may be in a foreign character: *Notham v. Cohen*, 3 Dowl. 370.

The description of a person is that which tells what he is, and when a statute required the name, place of abode and description of a person to be given, and only the name and place of abode were given, it was held to be a total omission of the description: *R. v. Tugwill*, L.R. 3 Q.B. 704. "Gentleman" is not a proper description of a deponent who has any office or occupation: *Allen v. Thompson*, 1 H. & N. 15; *Adams v. Graham*, 33 L.J.Q.B. 71; *Ex parte Hooman*, L.R. 10 Eq. 63; *Broderick v. Seole*, L.R. 6 C.P. 98; but is of a person who never had any occupation: *Gray v. Jones*, 14 C.B.N.S. 743; or who is out of employ-

ment: *Moorewood v. South Yorkshire Ry. Co.*, 3 H. & N. 798; *Smith v. Cheese*, 1 C.P.D. 60; but is not a proper description of a solicitor's clerk: *Beales v. Tennant*, 29 L.J.Q.B. 188, even though he had previously been a solicitor: *Tuton v. Sanoner*, 3 H. & N. 280. A deponent who had been a contractor and financial agent may be properly so described though not actively engaged in such business: *Sharp v. Brown*, 38 Ch. D. 427. A ship broker may be described as a "broker": *Gujen v. Sampson*, 4 F. & F. 974; but a stock broker could not be described as a stock exchange broker: *Re Levy*, 60 L.T.N.S. 317. A clerk in the Admiralty is properly described as a "government clerk": *Grant v. Shaw*, L.R. 7 Q.B. 700. A schoolmaster is not properly described as a "tutor": *Lee v. Turner*, 20 Q.B.D. 773. A clerk to an accountant who sometimes did business on his own account was sufficiently described as an accountant: *Briggs v. Boss*, L.R. 3 Q.B. 268; but a clerk in an accountant's department of a railway company would not be truly described as accountant: *Larchin v. North Western Deposit Bank*, L.R. 10 Ex. 64.

The place of abode should be that at the time of making the affidavit: *Butler v. O'Neil*, 4 C.P.D. 354. The place of business of the deponent or of his employer is sufficient: *Attenborough v. Thompson*, 2 H. & N. 559; *Blackwell v. England*, 8 E. & B. 541; *Simmons v. Woodward*, (1892) A.C. 100.

If an action has been commenced the court and style of cause must be placed at the head of every affidavit intended to prove any fact therein: Rule 263, and in a contemplated action it is proper to entitle the affidavit, "In the matter of a contemplated action": *Young v. Brassey*, 1 Ch. D. 277. If there is a cause in court and the affidavit is not entitled therein it is bad, because no perjury can be assigned on it: *Re Burrowes*, 18 C.P. 502. The jurat to an affidavit made by more than one person should give the names of all the deponents, and if taken at one time by the same officer, he may state that it was "sworn by both (or all) of the above named deponents: Rule 264. The following form may be used: "The above named deponents, A.B. and C.D., were severally sworn at Paris, in the County of Brant, this day of 19 , before me, E.F. A Commissioner, etc."

If sworn by an illiterate or blind person the jurat should state that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the officer. If this is not done the affidavit cannot be received in evidence, unless the judge is satisfied that the affidavit was read to and was understood by the deponent: Rule 266.

If there are interlineations, alterations or erasures in the jurat or in the body thereof the affidavit cannot be used without the leave of the judge: Rule 268. Leave will probably be granted when the alteration, interlineation or erasure is initiated by the officer taking the affidavit. But a clerk or bailiff would have no authority to accept an affidavit having an alteration, interlineation or erasure in it without first applying to the judge for the necessary leave to use it. If endorsed by the judge as follows: "Leave is hereby given to read and make use of the within affidavit, notwithstanding the interlineation, (alteration or erasure) therein," it will be sufficient.

Old rule 133 providing that the judge should not be bound to reject any affidavit not in accordance with the rules, is superseded by the present rules from which the provision has been omitted.

An affidavit sworn before a notary public in Ontario should be authenticated by his seal of office: *Boyd v. Spriggins*, 17 C.L.T. 58. But see *Ryan v. Sutherland*, 17 P.R. 331.

A clerk or commissioner in taking an affidavit, should subscribe not only his name, but the word "Commissioner" or "Comr." or Clerk," as the case may be: *Pawson v. Hall*, 1 P.R. 294; *Brett v. Smith*, 1 P.R. 309; *Babeock v. Mun. Council of Bedford*, 8 C.P. 527.

If sworn in a foreign country, and that fact is duly certified to, the absence of the signature of deponent has been held no objection: *Re Howard*; *Re Ashcroft*, L.R. 9 C.P. 347; but if the signature of the commissioner were omitted, the affidavit would not be received: *Nisbet v. Cock*, 4 A.R. 200.

Affidavits purporting to be sworn on a day not arrived are void: *Re Robertson*, 5 P.R. 132.

The jurat may be referred to, to explain the date of a fact deposed to in the affidavit: *Lyman v. Brethorn*, 2 Chamb R. 108.

The presumption of law is that an affidavit is in the same state as when it was sworn, as to alter it is an act of fraud and misconduct which will not be presumed: *R. v. Gordon*, Dears. C.C. 586.

An affidavit purporting to be "sworn before at, etc.," omitting the word "me," held sufficient: *Martin v. McCharles*, 25 U.C.R. 279; but where the words were "sworn at, etc.," omitting "before me," it was held insufficient: *Archibald v. Hubley*, 18 S.C.R. 116. For forms of general heading and conclusions of affidavits see Form 22; Rule 267.

It is particularly to be noted that the affidavit must state the six distinct facts enumerated in sub-section 4. The omission of any one fact would be fatal to the application. It is submitted that if the necessary facts are sworn to, the judge has no discretion to refuse the application.

Affidavits Not to be Sworn Before Solicitor or Agent of Party.—No affidavit in any action in a Division Court sworn before the solicitor or agent of the party on whose behalf it was made or before the clerk or partner of such solicitor or agent shall be read: 62 Vie. c. 11, s. 7.

The Affidavit must be Made, etc.—This is imperative, and unless some satisfactory reasons are given, an affidavit of the attorney or agent would not be sufficient; see *Herschfeld v. Clarke*, 11 Ex. 712; *Christopherson v. Lotinga*, 15 C.B.N.S. 809; *Barwick v. De Blaquiere*, 4 P.R. 267; *Tiffany v. Bullen*, 18 C.P. 91; *Frederici v. Vanderzee*, 2 C.P.D. 70.

The "satisfactory" reasons which it will be necessary to show will depend on the circumstances of each case. But, it is submitted, that, in general, the only valid reason would be the impossibility of obtaining the defendant's affidavit, at the time when it was required, after all reasonable efforts had been made to do so. A slight inconvenience would not be sufficient. What are satisfactory reasons is a question for the judge.

Notice to Plaintiff.—The statute does not expressly or impliedly state that the order can be made, *ex parte*. It is submitted, therefore, that the plaintiff should have an opportunity of showing cause.

"It is one of the first principles of justice that no man's rights shall be adjudicated upon without giving him an opportunity of being heard in support of them;" *per Willes, J.*, *Thorburn v. Barnes*, L.R. 2 C.P. at p. 401; see *Fisher v. Keane*, 11 Ch.D. 353; *Ex parte Tucker*, *Re Tucker*, 12 Ch.D. 308; *R. v. Law*, 27 U.C.R. 260.

No provision is made for the costs of the application, so that only costs of the ordinary fees of the clerk and bailiff under the tariff would be allowable. Should one of the parties die during the consideration of the application, the judge could still make the order, dating it as of the day of the argument: *Ward v. Vance*, 3 P.R. 210.

Fortwith Transmitt.—The duty of the clerk in this respect is imperative, and his wrongful refusal could be followed by *mandamus*: *R. v. Fletcher*, 2 E. & B. 279; *Re Linden v. Buchanan*, 29 U.C.R. 1, and it would probably be granted with costs: *R. v. Langridge*, 24 L.J.Q.B. 73.

As to the meaning of the word "forthwith" see notes to section 24, *ante* p. 19. When an act is one which is capable of being done without delay, no delay can be permitted: *per* Jessel, M. R., *Re Southam, Ex parte Lamb*, 19 Ch. D. 69. See also *Furber v. Cobb*, 18 Q.B.D. 494, at p. 504; *Love v. Fox*, 15 Q.B.D. 679, *per* Bowen, L.J. It means "speedy and prompt action and an omission of all delay:" *per* Cockburn, C.J., *R. v. Berkshire (Justices)*, 4 Q.B.D. 469. In matters of procedure it sometimes means within twenty-four hours: *Morton v. Bank of Montreal*, 18 C.L.T. 157. Where a consequence is "forthwith" to follow an event it imperatively excludes a time within which something else may be done inconsistent with that consequence, as when a statute says that on the resignation of a corporate officer the town council shall "forthwith" declare the office vacant, the resignation cannot be withdrawn: *R. v. Wigan*, 14 Q.B.D. 908.

Shall Enter.—The plaintiff must prepay the clerk's costs, otherwise he would not be obliged to enter the suit: see section 58.

It is submitted that the defendant would have the same time for disputing the plaintiff's claim as if the summons had been originally issued from the court to which the action is removed, unless the judge by his order should prescribe the time for entering the defence.

"Forthwith Cause to be Served:" see note *supra* as to meaning of "forthwith."

If the order is not taken out or acted upon the defendant would be taken to have abandoned it: *Kenny v. Hutchison*, 6 M. & W. 134; *Belcher v. Goodered*, 4 C.B. 472; *Normanby v. Jones*, 3 D. & L. 143; *Kerr v. Douglass*, 26 U.C.R. 357; 4 P.R. 102; *Morley v. Bank of B.N.A.*, 10 U.C.L.J. 128; *Ferguson v. Elliott*, 7 P.R. 7; *Kelley v. Wade*, 14 P.R. 13; *Molsons Bank v. Dillabaugh*, 13 P.R. 312.

If the order be waived or abandoned it is not necessary to set it aside: *Re Wilson and Hunter*, 9 U.C.L.J. 133.

Same Manner as Summonses.—As to service of summons: see sections 100 to 103; Rules 16 to 21.

91.—(1) If an action shall be entered in a Division Court which should have been entered in some other Division Court of the same or some other County, the cause shall not abate as for want of jurisdiction, but on such terms as the Judge shall order, all the papers and proceedings in the cause may be transferred to any Division Court having jurisdiction in the premises, and shall become proceedings thereof as if the cause had been at first properly entered therein, and the same shall be continued and carried on to the conclusion thereof as though the action had originally been entered in the said last mentioned court; but the party making the application shall satisfy the Judge by affidavit of the alleged want of jurisdiction of the said Court. R.S.O. 1887, c. 51, s. 87; 52 V. c. 12, s. 5, part.

(2) The Clerk of the Court to which proceedings have been transferred, shall place the action on the list for trial at the next sittings of his Court, if he receives the papers in the cause six clear days or more before the date of the said sit-

When
action
entered in
wrong
court.

tings, but if not, then he shall place it on the list for trial at the sittings next thereafter; and he shall forthwith, after receiving the said papers, notify the parties or their agents by mailing them registered notices informing them of the date, hour and place of the said sittings, and the Clerk of the Court issuing the summons shall certify in detail to the Court to which the case is transferred all the costs incurred in the action up to the date of such transfer. 52 V. c. 12, s. 5, part.

Want of Jurisdiction.—The question of territorial jurisdiction is one very frequently raised in Division Courts, and in such cases the judges are compelled to apply the provisions of this section whenever it is found that an action has been brought in the wrong division. The question is fully discussed in the notes to section 84.

Application for Transfer.—The application may be made at any time before or at the trial: *Re Thompson v. Hay*, 22 O.R. 583; 20 A.R. 379.

It has been held that if the section did not take away the right to prohibition it at least contemplated an application being made in the first instance to the Division Court Judge, and when such application was not made prohibition was refused: *Re Watson v. Wolverton*, 9 C.L.T. 480; affirmed by C.P. Divisional Court, 22 O.R. 586 (*n*); followed in *Re Hill v. Hicks*, 28 O.R. 390; but see *Re Brazill v. Johns*, 24 O.R. 209.

But if the judge declines to try the question or gives a wrong decision upon it prohibition will be granted, and the onus of having the case transferred to the proper court is upon the plaintiff: *Re Thompson v. Hay*, 22 O.R. 583; 20 A.R. 379.

A garnishee proceeding under section 190 is an "action" within the meaning of this section and may be transferred from a wrong to a proper division: *Re McCabe v. Middleton*, 27 O.R. 170.

Either party may make the application. If the jurisdiction is disputed and the court is satisfied that it has no jurisdiction the plaintiff would be unsafe in taking judgment: *Re Thompson v. Hay*, 22 O.R. 583; 20 A.R. 379. The judgment would be a nullity: *Re Forbes v. Michigan Cent. Ry. Co.*, 20 A.R. 584; *Keating v. Graham*, 26 O.R. 360.

"The party making the application must satisfy the judge by affidavit of the alleged want of jurisdiction": see notes to section 90, as to the affidavit, etc. For form of affidavit see form 42. The judge of the court in which the action is entered is no doubt referred to, but the section does not say so. The order need not specify the date of the sittings of the court to which the case is transferred at which the case shall be tried, as is required under section 90, sub-section 6.

There is no power to transfer an action in a Division Court upon any other ground than want of jurisdiction.

For forms of notice of motion or summons see form 215, and for form of order see form 216.

Upon Such Terms as the Judge Shall Order.—The terms a judge should impose will depend entirely upon the circumstances of each particular case. The proceeding is somewhat analogous in this respect to an application to postpone a trial or for the amendment of proceedings, in both of which cases the general rule is to impose the payment of costs.

Formerly the power of the judge to impose costs, in such cases, was doubted, but by section 213, sub-section 2, that difficulty is removed.

Effect of Transfer.—It is only upon the transfer that the suit becomes effective. Therefore it was held that a garnishee summons properly

issued and served will take priority over one which is issued in the wrong division though it is afterwards transferred to the proper division: *Sewrey v. Burke*, 16 C.L.T. 322.

Sub-Section 2—Clerk's Duties.—The clerk who issued the summons must certify to the court to which the case is transferred, in detail, all the costs incurred up to the date of transfer, inclusive: Rule 159. He should also furnish the clerk of the court to which the action is transferred with the addresses of the parties to the suit.

The clerk who receives the papers and proceedings is required to enter them in his procedure book and number the action in its regular order as if it were a new action, and place it on the list for trial: Rule 157. He is also required to *forthwith* notify the parties or their agents of the date, hour and place of sitting at which the action will be tried: Rule 158.

When final judgment is entered, the summons and particulars of claim, with the affidavit of service of both, are to be filed by the clerk: Rule 160.

For form of notice or summons see section 102, Rule 24 and form 48.

Lists for Trial.—See section 121; Rule 155.

Next Sitzings of the Court, e.g., that which shall be held next following the date on which the papers and proceedings are received by the clerk. See *Booth v. Vicars*, 13 L.J. Ch. 147; *R. v. Surrey (Justices)*, 6 Q.B.D. 160; *R. v. Sussex (Justices)*, 4 B. & S. 966.

Six Clear Days.—"Clear days" mean that the time is to be reckoned exclusive of both first and last days: *Liffin v. Pitcher*, 1 Dowl. N.S. 767; *Re Sams and The City of Toronto*, 9 U.C.R. 181; *Re Railway Sleepers Co.*, 29 Ch. D. 204; *Zouch v. Empsey*, 4 B. & Ald. 522; *R. v. Shropshire*, 8 A. & E. 172; *R. v. Aberdare Canal Co.*, 14 Q.B.D. 854.

The day on which the papers were received and the court day would be excluded.

Forthwith.—As used here "forthwith" implies speedy and prompt action and an omission of all delay; as quickly as is reasonably possible: *R. v. Berkshire Jus.* 4 Q.B.D. 469; Notes to section 90.

Registered Notices.—The notices must be sent by post, prepaid and registered. It would not be a compliance with the statute to deliver them in any other manner: See notes to section 205. The clerk is to register all notices sent by mail and to preserve the certificate of registration with the other papers in the suit: Rule 169.

Costs Incurred, etc.—The clerk of the court in which the action was originally entered should be paid his costs at the time the claim was entered. He would not be bound to act if they are not so paid, nor would the clerk of the court to which the transfer is made be obliged to enter the suit until his costs are paid: See section 58 and notes thereto. Each clerk will only be allowed to charge for the proceedings in his own court.

The defendant, it is submitted, should by the order transferring the action, be relieved of any costs other than those which would have been occasioned had the case been originally entered in the proper court.

Notices on Summonses.—See section 102; Rule 24; Form 48.

92.—(1) Every Clerk or Bailiff may sue and be sued for any debt due to or by him, as the case may be, separately or jointly with another person in the Court of any next adjoining division in the same County, in the same manner, to all intents and purposes, as if the cause of action had arisen within

Clerks and bailiffs may sue and be sued in adjoining divisions.

such next adjoining division, or the defendant was resident therein, and no Clerk or Bailiff shall bring any action in the Division Court of which he is Clerk or Bailiff. R.S.O. 1887. c. 51, s. 88.

Actions by
and against
clerks and
bailiffs
commenced
before ap-
pointment.

(2) Nothing in this section contained shall be taken to prevent any proceedings from being continued in the Court in which the action was brought, where such action was commenced before the appointment of such Clerk or Bailiff. 52 V. c. 12, s. 6.

Suits by or against Clerks or Bailiffs.—This provision is merely permissive as regards persons who may wish to sue clerks or bailiffs, but the prohibition as to a clerk or bailiff is complete. In other words, a clerk or bailiff can be sued in his own division, but he cannot himself sue for anything there. It has been said, "For any other cause of action but a 'debt,' must not a clerk or bailiff sue in a higher court, if cause of action arise in his own and defendant resides in his division?" He cannot sue in his own division for anything whatever, and he can only sue in the "next adjoining division" where it is for a "debt due him": see 1 L.C.G. 54; 2 L.C.G. 142; 4 U.C.L.J. 157; 9 U.C.L.J. 99.

Quaere.—Can a clerk sue in the adjoining division upon a cause of action not arising in his own division against a person not resident therein? The language of the section would appear to cover such a case, but the intention must have been to substitute the court of the adjoining division for the clerk's court when such court had complete jurisdiction and was really the only court in which, otherwise, the action could be brought.

In the Same County.—The action must be brought in the adjoining division in the same county and not in another adjoining county, unless the place of sitting is nearest to the defendant's residence, under section 93. See notes to section 93.

Where a judgment has been obtained in a Division Court, the plaintiff may maintain an action against the bailiff for neglect to levy upon the goods of the defendant under a warrant of execution delivered to such bailiff for that purpose: *Watson v. White*, (1896) 2 Q.B. 9.

Sub-Section 2.—If an action against a clerk or bailiff is pending in the court at the time of his appointment, it may be continued and enforced in the ordinary way, notwithstanding such appointment.

As to particulars in actions against officers and their sureties, see Rule 6; Form 18.

Clerk or
bailiff may
be sued in
court in
adjoining
county.

93. Notwithstanding anything in this Act contained, a Clerk or Bailiff of a Division Court may be sued in the court of an adjoining County, the place of sitting whereof is nearest to the residence of the defendant without the County in which he holds his office as Clerk or Bailiff; and upon a transcript of a judgment which may be recovered against any Clerk or Bailiff in such action being sent to and received by the Clerk of the Court of any division adjoining the division for which the defendant was or is Clerk or Bailiff in the County in which the last named division is situate, with

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a certificate of the amount due on such judgment, as provided by section 223 of this Act, such proceedings for enforcing and collecting the judgment by way of execution and otherwise may be had and taken in the Division Court to which the transcript has been so sent by the officers thereof as may be had or taken for the like purpose upon a judgment regularly recovered in any Division Court, R.S.O. 1887, c. 51, s. 89.

May be Sued.—See notes to section 91.

Adjoining County.—The term "adjoining" means touching or contiguous as distinguished from lying near or adjacent; in contact with: *Re Ward*, 52 N. Y. 397; *Miller v. Mann*, 55 Vt. 479. In a penal statute the word means "absolutely contiguous without anything between": *per Parke, J.*, *R. v. Hodges*, Moo. & M. 341. But the meaning in other statutes is less strict: see *Lon. & S. W. Ry. Co. v. Blackmore*, L.R. 4 H.L. 610; *Hobbs v. Mid. Ry. Co.*, 20 Ch. D. 418, *per Manisty, J.* And an "adjoining owner" was held to include an owner of land separated from surplus lands of a railway by only a private road over which such owner had a right of way: *Coventry v. L. B. & S. C. Ry. Co.*, L.R. 5 L.q. 104. See also *Harrison v. Good*, L.R. 11 Eq. 338.

Nearest to the Residence.—The place of sitting does not here refer to the municipality, but the building in which the court is held: *Re Timson*, L.R. 5 Ex. 257; *Shaw v. Morley*, L.R. 3 Ex. 137; *Bowes v. Fenwick*, L.R. 9 C.P. 339; *Eastwood v. Miller*, L.R. 9 Q.B. 440; *Haigh v. Sheffield*, L.R. 10 Q.B. 102; *Snow v. Hill*, 14 Q.B.D. 588.

As to how distance is to be measured, see notes to section 85.

As to residence of a party, see notes to section 84.

In the County.—The permission here given to sue a clerk or bailiff is confined to the courts of an adjoining county, and provision is also made for the enforcement of a judgment by transcript in the division in the same county adjoining his own.

Suing More Than One.—It is only when the clerk or bailiff is sued alone that the section applies. The adjoining division is not to be treated as the division in which the officer sued resides so as to enable the court to acquire jurisdiction over a co-defendant who could not be sued in such division: *Re Hill v. Hicks*, 28 O.R. 390.

94. Any action, by or against a Judge or Junior Judge of a County Court, which is within the competence of a Division Court, may be brought in a Division Court of any County adjoining that in which the Judge or Junior Judge resides; and any action by or against a Stipendiary Magistrate, if the same is within the jurisdiction of any Division Court of his District, may be brought in any Division Court of any adjoining County or District. R.S.O. 1887, c. 51, s. 90.

Action
against
County
Judge or
Stipendiary
Magistrate.

Within the Competence of a Division Court.—The action must be within the jurisdiction of a Division Court. Even the consent of the parties could not give jurisdiction in a case beyond the competence of any Division Court: *Jones v. Owen*, 5 D. & L. 668; *Buse v. Roper*, 41 L.T. 457; *Wellesley v. Withers*, 4 E. & B. 759; *Foster v. Usherword*, 3 Ex. 3; *Farquharson v. Morgan*, (1894) 1 Q.B. 552; *Lee v. Cohen*, 71 L.T. 824. See notes to section 71, *ante*, p. 59.

Judge or Junior Judge Resides.—The judge or junior judge must reside in the county of which he is such, so that the "adjoining county" may be taken to mean the county adjoining that in which the person sued is judge or junior judge.

Trial may
by consent
be in any
division.

95. Notwithstanding anything in this Act contained, any action within the jurisdiction of the Division Courts may be entered, tried and finally disposed of by the consent of all parties in any Division Court. R.S.O. 1887, c. 51, s. 91.

Consent of all Parties.—Before the introduction of this section jurisdiction could not be given by the consent of parties; see notes to section 94. The consent here given has been said to refer to cases sued in the wrong division in which the parties may consent to give the court the right to try and dispose of them as if properly entered. The same effect is obtained by the defendant neglecting to comply with section 205. The provision has been taken advantage of by a class of persons having their head offices in populous centres who deal with farmers and others, through agents, and who could not readily recover their damages if brought in divisions convenient to the residences of the defendants where they could be defended without great loss of time and expense. In these cases it may be pointed out that the most convenient and least expensive means of defence is afforded by section 207, which permits the judge to receive as evidence the affidavit or affirmation of witnesses resident without the county in which the suit is to be tried.

The consent under this section need not be in writing: *R. v. Salop* (Jus.), 4 B. & Ald. 626; *R. v. Surrey* (Jus.), 5 B. & Ald. 539; *R. v. Huntingdonshire* (Jus.), 19 L.J.U.C. 127; *R. v. Lincolnshire* (Jus.), 3 B. & C. 548: Contrast section 122; *R. v. Nichol*, 40 U.C.R. 76. The verbal consent of the parties would be sufficient though more difficult of proof if disputed. The word "consent" means "agreement of mind," "concurrence of wills": *Anderson* 250. It is an agreement of the mind to what is proposed or stated by another": *Plummer v. Commonwealth*, 1 Bush. 78: In *Siggers v. Evans*, 5 E. & B. at p. 374, *Erle, J.*, says: "assent is an ambiguous word; it may mean an external act, or a resolution of the mind."

In general, knowledge of the fact is an essential element in such cases in order to bind a defendant by his conduct: *Westloh v. Brown*, 43 U.C.R. 402: *Re Collie*, 8 Ch. D. at p. 817; *Johnson v. Credit Lyonnais Co.*, 3 C.P.D. at p. 40, *per Cockburn, C.J.* See also *Crossman v. Shears*, 3 A.R. 583; *Wallace v. Fraser*, 2 S.C.R. 532; *Polak v. Everett*, 1 Q.B.D. 669; *R. v. Lock*, L.R. 2 C.C. 14, *per Quain, J.*: *La Banque Jacques Cartier v. La Banque D'Epargne, etc., de Montreal*, 13 App. Cas. 111.

Whether or not consent has been given is a matter of fact, not of law: *Mason v. Farnell*, 12 M. & W. 674.

The consent could be given at any time before trial, or even on the face of the contract; *Copin v. Adamson*, L.R. 9 Ex. 345. Both parties must consent; but the plaintiff's consent may be presumed from the fact of his suing in a particular court, or taking a security with such a consent as the section requires on the face of it.

Forward-
ing sum-
monses for
service in
other
divisions.

96. The Clerk of any Division Court shall, when required, forward all summonses to the Clerk of any other Division Court for service, and the Clerk of any Division Court shall receive any summonses sent to him by any other Division Court Clerk for service, and he shall hand the same to the

Bailiff for service, and when returned shall receive the same from the Bailiff and return them to the Clerk from whom he received them, and every Clerk shall enter all such proceedings in a book to be kept by him for that purpose. R.S.O. 1887, c. 51, s. 92,

Shall Receive any Summonses.—The clerk may under sections 54, 55 and 56 insist on prepayment of his own and bailiff's fees. See notes to those sections.

97. In all cases not already provided for, where, in any action or proceeding in a Division Court, it is necessary for any party thereto to give notice to any other party thereto or to the Clerk of the Court, such notice shall be in writing. R.S.O. 1887, c. 51, s. 93.

Notices to
be in
writing.

In Writing.—"Writing," or "written," or any terms of like import, shall include words printed, engraved, lithographed or otherwise traced or copied: Interpretation Act, section 8, (14) The language of this section is imperative, and any verbal notice would be inoperative, and might be entirely disregarded: *Re McGregor v. Norton*, 13 P.R. 223.

The fees also must be paid: see section 58: *Re Parke v. Clarke*, 14 C.L.T. 32.

Notices.—All notices required by the rules or by the practice of the court must be in manuscript or print, unless expressly authorized by the court or a judge or by the rules to be given orally. Rule 240. See also section 119.

Entry of Claim, Service, etc.

98.—(1) The plaintiff shall enter with the Clerk a copy (and if necessary, copies) of his account, claim or demand in writing in detail (and in cases of tort, particulars of his demand) and each copy shall be numbered according to the order in which the copies are entered, and thereupon a summons shall be issued, bearing the number of the account, claim or demand on the margin thereof, and corresponding in substance with such form as may be prescribed by the General Rules or Orders relating to Division Courts from time to time in force, according to the nature of the account, claim or demand, and on the trial of the cause no evidence shall be given by the plaintiff of any cause of action except such as is contained in the account, claim or demand so entered.

Entry of
claim with
clerk.

(2) In any action brought to recover a sum of money due on a promissory note, the note shall be filed with the Clerk before judgment, unless otherwise ordered, or unless the loss of the note be shown, or that it cannot for some other satisfactory reason be produced. R.S.O. 1887, c. 51, s. 94.

Promissory
note to be
filed before
judgment.

Particulars of his Demand.—This section prescribes the manner of entering a Division Court suit. On entering a claim with the clerk, the plaintiff must furnish a copy, or, if necessary, copies of his claim in detail, and in cases of tort (personal actions under section 72, classes (a) and (b)), particulars of demand.

Frequently such forms of account as, "to amount of account rendered" are given, as the particulars here required. Such are insufficient. The statute requires *particulars in detail*. As to the claim and particulars: see rules 3 to 7.

The particulars of claim, the facts constituting the cause of action and the amount claimed, must be set forth: Rule 4. Unless particulars are given with reasonable certainty and detail, judgment by default cannot be signed or ordered under sections 113, 114 and 115; and it is only when such particulars have been *personally* served, that judgment may be given for default at the trial without further proof under section 123.

The claim when entered with the clerk should contain *all* the requisites of this section and of the rules referred to in order to be complete.

For forms of particulars, see appendix of forms.

The plaintiff is bound to furnish the claim and the clerk should not prepare it, and cannot make any charge for it if he does: see Rule 197. When there is only one defendant the clerk may charge for *only two* copies of the claim and summons under any circumstances. The christian and surname of the plaintiff or plaintiffs should be inserted in the summons: Rule 3; Arch. Prae. 12th ed. 187; Walker & Co. v. Parkins, 2 D. & L. 982. A note payable to J. S. & Co. was held to be properly sued upon in that name, on evidence that they were the persons so designated: Wallace v. Souther, 16 S.C.R. 717.

The defendant's christian and surname should, in general, be inserted in full. He may be sued by any name or names he may have acquired by usage or reputation, and this applies to both his christian and surname: Arch. Prae. 186; Williams v. Bryant, 5 M. & W. 447; Browne v. Smith, 1 P.R. 347; Cor. of the Township of Beverley v. Barlow, 10 C.P. 178; R. v. Worthanbury (Inhabitants) 7 Q.B. 555; Price v. Harwood, 3 Camp. 108; Borthwick v. Ravenscroft, 5 M. & W. 31; *Re* Clarke and Chamberlain, 18 O.R. 270.

A Summons Shall be Issued.—See notes to section 44, *ante* p. 35. The first process for a recovery of a debt or money demand or for a tort or other personal action may be an "ordinary summons": Rule 10, Form 49. And in actions for a debt or money demand when particulars of the plaintiff's claim are given with reasonable certainty and detail, such process may be a "special summons": Rule 11; Form 47. An "ordinary summons" requires the defendant to appear at the court to defend the action, while a special summons requires him to put in a notice disputing the plaintiff's claim and on his failure to do so *exdemns* him in the amount claimed. The clerk must issue a special summons where the proceedings warrant it: Rule 149.

Alias or Pluries Writ.—Where an alias or pluries process becomes necessary, it shall be dated on the day on which it actually issued: Rule 12. An "alias" writ is a second writ, and a "pluries" writ is any writ after the second: Wharton, 36, 560; 7 U.C.L.J. 178.

Concurrent Summonses.—Where there are more defendants than one and they reside in different counties, concurrent summonses may issue for the defendants residing out of the county in which the action is brought but costs only of the summonses actually served shall be allowed on taxation, unless the judge otherwise orders. Such concurrent summonses must correspond with the original and be marked in the margin "Concurrent summons": Rule 15.

Where Special Issued Instead of Ordinary Summonses.—If a mistake is made and a special summons is issued instead of an ordinary summons or *vice versa* the same may be amended by order of the judge, either before or at the hearing, on such terms as the judge may direct: Rule 26.

If a special summons should be issued instead of an ordinary summons judgment by default could not be entered: See section 113; and if an ordinary summons should be ordered by the plaintiff for a claim on which a special summons would be warranted, he runs the risk of costs under rule 140 (a).

Amendment of Claim.—The omission to state the place of abode would be merely an irregularity and could be waived: *Ross v. Gandell*, 7 C.B. 766; or amended under the wide powers of amendment conferred by the rule: see Rules 4 and 239; *Matthews v. Victoria (city)*, 5 B.C.R. 287; *Conrad v. Alberta Mining Co.*, 17 C.L.T. 133; *Miller v. Flewelling*, 17 C.L.T. 265. If the name or description of the plaintiff is insufficient or incorrect, it may be amended at the instance of either party: Rule 218. See also Rules 100, 214, 215 and 236. A reasonable degree of certainty in the description of the defendant's residence, etc., will suffice: *Arch. Prac.* 186, 187. A defendant described as of "Clapham in the county of Surrey," was held sufficient: *Toulmin v. Bowditch*, 11 Jur. 45. Under a similar Rule to Rule 218, where an action was brought in the name of an officer of a local authority, instead of the local authority itself, the name of the latter was substituted for the original plaintiff: *Mills v. Scott*, L.R. 8 Q.B. 496; see *Bolingbroke v. Townsend*, L.R. 8 C.P. 645.

An amendment may be allowed up to the last stage of the proceedings on proper terms: *Peterkin v. McFarlane*, 9 A.R. 429; *Re Trufort*, 34 W.R. 56. If all the evidence has been given it is a mere matter of form to adopt the particulars to the matters proved: *Gough v. Bench*, 6 O.R. 699. "Courts do not exist for the sake of discipline, but for the sake of deciding matters in controversy and I do not regard such amendment as a mere matter of favor or of grace;" *per Bowen, L.J.*, *Cropper v. Smith*, 26 Ch. D. 700 at p. 710. Therefore there is no kind of error or mistake, which if not fraudulent or intended to overreach, a court ought not to correct if it can be done without injustice to the other party: *Ib.*

Refusal of Amendment.—If the defendant cannot be compensated in costs, leave to amend should not be given: *Re Gaulard and Gibbs' Patent*, 57 L.J. Q.B. 209; and where parties cannot be placed in the same position as if the claim had been correct in the first instance leave should be refused: *Steward v. North Metropolitan Tram. Co.*, 16 Q.B.D. 556; as where the amendment would deprive defendant of the defence of the Statute of Limitations: *Weldon v. Neal*, 19 Q.B.D. 394.

The court may refuse to allow an amendment raising an entirely new case: *Newby v. Sharp*, 8 Ch. D. 39; *Smith v. Boyd*, 18 P.R. 296; and an amendment will not be allowed for the sole purpose of determining how the costs of the action shall be awarded: *Webber v. Wedgewood*, W.N. (1883) 8.

As to adding and changing parties, see section 112 and notes thereto.

Assignment of Chose in Action.—The Judicature Act, R.S.O. c. 51, section 58 (5) contains the rule of law in force since 31st December, 1897, with reference to the legal assignment of choses in action. The sub-section is similar to that contained in the English Judicature Act, 1873, (36 and 37 Vic. c. 66) section 25 (6). The former law on the subject in Ontario was contained in R.S.O. (1887) c. 122. Notice was formerly not necessary to perfect the legal title though payments made by the debtor without notice were protected. Notice is now necessary to vest the legal title in the assignee. A letter addressed to a tenant, of which notice is given to him, directing him to pay the plaintiff the rent until the order shall be countermanded is an absolute assignment: *Knill v.*

Prowse, 33 W.R. 163. The assignment must not be by way of charge only. But an assignment of debts upon trust that the assignee shall pay himself a sum due and the remainder to the assignor is a valid assignment; *Burlinson v. Hall*, 12 Q.B.D. 347; and so is a mortgage of debts in the ordinary form with a proviso for redemption: *Tancred v. Delagoa Bay Co.*, 23 Q.B.D. 239; and so is an assignment in trust to pay several sums: *Comfort v. Betts*, (1891) 1 Q.B. 737; *Duff v. Canadian Mutual Fire Ins. Co.*, 9 P.R. 292. But in *National Provincial Bank v. Harle*, 6 Q.B.D. 626, it was held that a mortgage of debts was not a good legal assignment. The assignment must be an assignment of the whole contract and not merely of the rights and interests of the assignor as security for a debt: *Mercantile Bank v. Evans*, (1899) 2 Q.B. 613.

The assignment must be in writing: *Rennie v. Block*, 26 S.C.R. 556. Notice may be given after the assignor's death: *Walker v. Bradford Old Bank*, 12 Q.B.D. 511. The meaning of the clause requiring notice is that until it is given the assignee would have to sue as he would theretofore have sued, i.e., in the name of the assignor or in an action to which the assignor is a party: *ib.* A debt not yet due may be assigned: *Brice v. Bannister*, 3 Q.B.D. 569; *Buck v. Robson*, 3 Q.B.D. 686; *Walker v. Bradford Old Bank*, 12 Q.B.D. 511, 516. The enactments as to assignments of debts affect procedure only and do not make anything an assignment which would not have been so before, e.g., a cheque: *Schröder v. Central Bank*, 24 W.R. 710.

The assignee takes subject to all the equities between the original parties: *Martin v. Bearman*, 45 U.C.R. 205; but an ultimate assignee is not subject to equities which would have been available against an intermediate assignee, but not against the original creditor: *Re Milan Tramways Co. Ex parte Theys*, 25 Ch. D. 587. See as to setting off damages against the assignor arising under the same contract, *ante* p. 111.

Under R.S.O. (1887) c. 122 it was necessary that the full beneficial interest should pass to the assignee: *Wood v. McAlpine*, 1 A.R. 234; see *Ward v. Hughes*, 8 O.R. 138.

Equitable Assignment.—There may be a good equitable assignment of a small sum out of a large amount: *Brice v. Bannister*, 3 Q.B.D. 569; *Ex parte Hill*, 10 Ch. D. 615; *Ex parte Moss*, *Re Toward*, 14 Q.B.D. 310; *Mitchell v. Goodall*, 44 U.C.R. 398; 5 A.R. 164; *Bank of British North America v. Gibson*, 21 O.R. 613. An order to amount to an equitable assignment should specify the fund out of which it is payable; *Hall v. Prittie*, 17 A.R. 306; *Percival v. Dunn*, 29 Ch. D. 128; but evidence is admissible to show that the order was in reality dealing with a particular fund; *Lane v. Dungannon Agricultural Association*, 22 O.R. 264; see *National Pro. Bank of England v. Harle*, 6 Q.B.D. 626; *Mercantile Bank v. Evans* (1899) 2 Q.B. 613.

A parol assignment of a chose in action is a valid equitable assignment: *Trusts Corporation of Ontario v. Rider*, 24 A.R. 157; *Todd v. Phoenix and United Fire Ins. Co.*, 3 B.C.R. 302. A present appropriation, by order, of a particular fund operates as an equitable assignment, and a promise or executory agreement to apply a fund in discharge of an obligation has the same effect: *Heyd v. Millar*, 29 O.R. 735. The endorsement and delivery of a banker's deposit receipt, with the intention to make a gift, operates as a good equitable assignment of the amount on deposit at the bank: *Re Griffin*, *Griffin v. Griffin*, (1899) 1 Ch. 408.

Whether a creditor can split up a single cause of action into many actions, without the consent of his debtor, is an interesting question, and the general opinion seems to be that he cannot. Mr. Justice Story said: "A debtor has a right to stand on the singleness of his original contract, and to decline any legal or equitable assignment by which it may be

broken into fragments. When he undertakes to pay an integral sum to his creditor, it is no part of his contract that he shall be obliged to pay in fractions to other persons:” *Mandeville v. Welch*, 5 Wheat. 286.

A debtor cannot, however, disregard an equitable assignment of a part, and cannot compromise or settle with the assignor or even modify the terms of the contract without the consent of the assignee after notice of the assignment: *Brice v. Bannister*, 3 Q.B.D. 569; *Burlinson v. Hall*, 12 Q.B.D. 347.

If the debtor consents to the assignment, as by accepting an order, the assignee may sue without making other holders of the demand parties to the suit: *Surtees v. Hubbard*, 4 Esp. 204; 6 R.R. 853; *Grant v. Aldrich*, 38 Cal. 514. Where there has been a partial assignment, the proper course would seem to be to make the assignor, if he retains any interest, and the other assignees, parties to the action against the debtor, and have the rights of all parties declared. The debtor in such cases might be allowed to retain his costs out of the fund: see *Lett v. Morris*, 4 Sim. 607; *Smith v. Everett*, 4 Bro. C.C. 64; *James v. Newton*, 2 New Eng. Rep. 820, where the American authorities are collected.

An accepted order is equivalent to payment as against the creditor or persons claiming Mechanics’ Liens under him: *Jennings v. Willis*, 22 O.R. 439.

Suits by Assignee.—When a legal assignment has been made the assignee must sue in his own name: *Wellington v. Chard*, 22 C.P. 518; *Cousins v. Bullen*, 6 P.R. 72; but when the assignment is merely equitable the assignee should be a co-plaintiff, or at any rate a defendant: *Daniels’ Ch. Pr.* 205. The assignor cannot be added as plaintiff without his own consent: rule 207. If the debt has been assigned by way of security only the assignor may maintain the action: *Prittie v. Connecticut Fire Ins. Co.*, 23 A.R. 449; but it may be proper to add the assignee so as to bind him: *Biggs v. Freehold Loan & S. Co.*, 26 A.R. 232, 148.

The assignee of a judgment may attach a debt due to the judgment debtor: *Goodman v. Robinson*, 18 Q.B.D. 332.

Promissory Note.—Before suing on a lost note, a plaintiff should tender sufficient security, otherwise he would be made to pay the costs of the suit: *La Banque Jacques Cartier v. Strachan*, 5 P.R. 159; see *Orton v. Brett*, 19 C.L.T. 117. The non-filing of a bond of indemnity for a lost note is a matter of practice and not a ground for interference with the Division Court on an application for prohibition: *Re McGolrick v. Ryall*, 26 O.R. 435.

Sub-section 2 was evidently intended for the purpose of altering the law as declared in the case of *Re Drinkwater v. Clarridge*, 8 P.R. 504, in which it was held that the clerk was bound to enter judgment on a special summons, without the production of the note sued on. The note must now be filed with the clerk before judgment.

The words “not transferable” printed across the face of a deposit receipt will not affect the validity of the claim of an assignee for the money deposited: *Re Commercial Bank of Manitoba*, (*Barkwell’s Case*) 11 Man. L.R. 494; see *Re Turean*, 40 Ch. D. 5.

99. The plaintiff shall furnish the Clerk with the particulars of his claim or demand, and the Clerk shall annex the plaintiff’s particulars to the summons, and he shall furnish copies thereof, to the proper person to serve the same. R.S.O. 1887, c. 51, s. 95.

Particulars of Claim. See section 98 and notes thereto.

Plaintiff to furnish particulars of claim to the clerk for service.

Shall Annex the Plaintiff's Particulars.—A copy of the claim must be annexed to the summons; and to each copy of summons to be served must likewise be annexed a copy of such claim; and it shall be deemed a part of the summons: rule 150.

The neglect of the clerk to comply with the statute and rules in this respect would not vitiate the proceedings. They would be amended, if necessary, upon proper terms, the principle of law, that the act of the court shall not injure any man, being applicable; see notes to section 98. Any damage which the plaintiff might sustain by want of reasonable care on the part of the clerk would be the subject of an action against him and his sureties.

The Proper Person to Serve the Same.—That is the bailiff. See section 54, *ante*, p. 42. Under the English County Court rules of 1875, it was provided, that "the summons shall be delivered to the bailiff." It was held that this rule was obligatory and not merely directory: *Barker v. Palmer*, 8 Q.B.D. 9.

Summons
to be served
ten days
before
return day.

100. The summons, with a copy of the account or of the particulars of the claim or demand attached, shall be served ten days at least before the return day thereof. R.S.O. 1887, c. 51, s. 96.

Ten Days at Least.—This means ten clear days, that is exclusive of the day of service and the day of return. Sunday would be included as one of the days: *Re Railway Sleepers Supply Co.*, 29 Ch. D. 204. See note to section 91, *tit.* "Clear Days." As to service see notes to section 103, and rules 16 to 19 inclusive.

Return Day.—The "return day" means the day on which the summons is returnable. Its primary meaning is the day originally fixed for the hearing: *R. v. Leeds Cour. v Court*, 16 Q.B.D. 691. Under the rules the summons is returnable on the eleventh day after service if the defendant, or one of the defendants, resides within the county in which the action is brought, and on the sixteenth day after service if none of the defendants reside within the county: rule 16. See also rules 17, 18 and 192. If the defendant resides out of the province the service shall be at least fifteen days before the return day of the summons: section 87 (2).

A defendant does not waive his right to the full time for trial by entering a dispute notice: *Zaritz v. Mann*, 16 C.L.J. 144; see also *Barker v. Palmer*, 8 Q.B.D. 9; *Hudson v. Tooth*, 3 Q.B.D. 46.

As to bailiff's duties on receiving summons for service, see rule 183.

As to service of summons in foreign division, see rule 154.

When sum-
mons to be
served if
defendant
resides out
of county.

101. In case any defendant resides outside of the County in which the action is brought the summons shall be served on every such defendant fifteen days at least before the return day thereof. 52 V. c. 12, s. 8; 60 V. c. 3, s. 3.

See notes to section 100.

Endorse-
ment upon
summons.

102. There shall be endorsed upon every summons a notice informing the defendant that in any case in which an order may be made changing the place of trial, application must be made to the Judge within eight days after the day of service thereof (where the service is required to be ten

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days before the return), or within twelve days after the day of such service (where the service is required to be fifteen days or more before the return). R.S.O. 1887, c. 51, s. 98.

Changing Place of Trial.—See section 91 and notes thereto. The notice required by this section must be endorsed on the summons and be signed by the clerk in the words of Form No. 48—Rule 24. Neglect of the clerk to sign the notice might be held to enlarge indefinitely (to the trial?) the right to move to change the place of trial. A lithographed signature would be insufficient: *R. v. Cowper*, 24 Q.B.D. 533; but the signature of the clerk's name, by a clerk in his office authorized by him, would be sufficient: *France v. Dutton*, (1891) 2 Q.B. 208. See also notes to section 72, *ante*, p. 89. The notice seems to be material only in cases falling within section 90, i.e., where the amount claimed exceeds \$100, and the action is brought in the division where it is payable. The time within which the application must be made is specific. No power is given to the judge to enlarge the time: see note to section 90 sub-section 3.

103. In case the amount of the account, claim or demand exceeds \$15, the service shall be personal on the defendant, and in case the amount does not exceed \$15, the service may be on the defendant, his wife, or servant, or some grown person being an inmate of the defendant's dwelling-house, or usual place of abode, trading or dealing. R.S.O. 1887, c. 51, s. 99; 52 V. c. 12, s. 9.

When service to be personal or otherwise.

Claim or Demand.—A sum included for interest will form part of the "claim or demand": *Insley v. Jones*, 4 Ex. D. 16; *Thompson v. Pearson*, 18 P.R. 420; *Rodway v. Lucas*, 10 Ex. 670; *Smart v. Niagara and Detroit Ry. Co.*, 12 C.P. 406; *Northern Ry. Co. v. Lister*, 4 P.R. 120; *McKenzie v. Harris*, 10 U.C.L.J. 213.

Personal Service.—Personal service means serving the defendant with a copy of the process, and showing him the original if he desire it: *Goggs v. Huntingtower*, 12 M. & W. 503.

Merely showing the summons to the defendant would not be good service; a copy must be left with him: *Worley v. Glover*, 2 Str. 877. If, on the refusal of a defendant to take the copy of the summons, the officer brings it away with him, the service is not good: *Pigeon v. Bruce*, 8 Taunt. 410; *Erwin v. Powley*, 2 U.C.R. 270.

Unless the defendant, within a reasonable time, asks to see the original summons, it need not be shown to him: *Petit v. Ambrose*, 6 M. & S. 274; *Thomas v. Pearce*, 2 B. & C. 761.

It has been held, that fifteen minutes was not an unreasonable time: *Westley v. Jones*, 5 Moore, 162.

If inspection of the original is demanded and refused the service is bad: *Weller v. Wallace*, R. & J.'s Dig. 2872.

The following have been held to be cases of personal service: Where the writ was put through the crevice of a door to the defendant, who had locked himself in: *Smith v. Wintle*, Barnes, 405; where the writ had been enclosed in a letter to defendant, which he had read, and from which he took out the copy: *Boswell v. Roberts*, Barnes, 422. See also *Aldred v. Hicks*, 5 Taunt. 186; but see the later case of *Redpath v. Williams*, 3 Bing. 443.

Where, the door of the defendant's house being fastened, the officer spoke to him through the closed window, explaining the nature of the process, and then placed a copy of it under the door informing defendant

thereof, after which he returned to the window and showed the original summons to defendant, who said, "That will do": *Re Colin Campbell*, 9 C.L.T. 145.

Service upon the treasurer was held good service upon the county: *Watts v. Beemer*, 8 C.L.J. 255 *per Wilkes*, Dy. J.

If the particulars of demand should be amended after service, judgment could not be entered without re-serving the summons; *Guess v. Perry*, 12 P.R. 460.

If a person refuses to take a copy of the summons, the proper course is to inform him of its nature, and throw it down in his presence: *per Patteson, J.*, *Thomson v. Pheney*, 1 Dowl. 443; but if the defendant is illiterate the document should be explained; *Ritz v. Schmidt*, 12 Man. L.R. 138.

In *Goggs v. Huntingtower*, 12 M. & W. 503, the facts were these. In order to serve defendant, a person went three times to his residence, when he saw a female servant, who said her master was not at home. On the third occasion the servant let down over the garden wall a basket, into which the writ was put. The servant then took back the basket; and shortly afterwards the voice of the defendant was heard in the yard saying to the servant, "Take it back; I will not have it." The party called on a subsequent day, when the servant said she had given the writ to her master. Held, not a personal service. In *Christmas v. Eicke*, 6 P. & L. 156, the facts were these. Several calls had been made at defendant's residence by the party who was endeavoring to serve the writ, without success. On the last occasion, having inquired if the defendant was at home, and having received an evasive answer, he waited in the hall. Having afterwards gone into the parlor for a few minutes, he saw the defendant running upstairs. He immediately followed after defendant, but before he could give him a copy of the writ, the defendant went into a room and fastened the door. He then called out to him, and told the defendant that he had a writ against him at the suit of the plaintiff, and, putting a copy of it through a crevice of the door, told him that that was a copy of the writ. Held, not actual personal service, but only constructive service. But see *Smith v. Wintle*, *supra*. Service upon "a female servant at the lodgings of the defendant" is not good service: *Price v. Thomas*, 11 C.B. 543. In *Heath v. White*, 2 D. & L. 40, it was held that where the party attempting to serve the writ of summons went to the defendant's house, and seeing him standing at a closed window on the ground floor, told him in an audible voice the purpose for which he came, and threw a copy of the writ down in his sight, and in the presence of his wife, who had come out of the house, and who had denied that he was at home, and left it lying there in defendant's garden, the service was not sufficient. If proceedings be taken as if personal service had been effected when it was not, they are irregular only, and not null (*Holmes v. Russel*, 9 Dowl. 487), and a defendant must move promptly after knowledge of it to set them aside: see *Johnston v. DeVeber*, 8 C.L.T. 383; or he will be taken to have waived the irregularity: *Willis v. Bull*, 1 Dowl. N.S. 303. But where no irreparable wrong will be done, a plaintiff who has obtained judgment by default, lapse of time is not a bar to the application to set it aside: *Atwood v. Chichester*, 3 Q.B.D. 722. If there are conflicting affidavits as to service, and the party serving has deposed to personal service, the courts will not set aside the proceeding upon an affidavit of the defendant that he has not been served: *Morris v. Coles*, 2 Dowl. 79; *Giles v. Hemming*, 6 Dowl. 325; *Emerson v. Brown*, 7 M. & G. 476. In actions against trading corporations, service should be made on the president, secretary, or any officer in the nature of a head officer; 1 *Tidd's Pr.* 121; *Newby v. Colt's Fire Arms Co.*, L.R. 7 Q.B. 293.

If the bailiff cannot effect the service of the summons, he must immediately after the time for service has expired, return the same to the clerk, stating the reason for non-service *in writing* on the back of the summons: Rule 183. Service may be made at any hour of the day or night: *Upton v. Mackenzie*, 1 D. & R. 172; *Priddee v. Cooper*, 1 Bing. 66. The summons may be served in any county in Ontario, and by any bailiff: *Re Ladouceur v. Salter*, 6 P.R. 305; although not bound to go outside of his own division: section 54: If served on a Sunday the service is void, and cannot be waived: *Taylor v. Phillips*, 3 East, 155. Service is good though made while defendant is attending court in his own cause: *Poole v. Gould*, 1 H. & N. 99; *City of Kingston v. Brown*, 4 U.C.R. 117. The summons, we need scarcely say, must be served by one who can read so as to be able to swear, if necessary, to the correctness of the copy: *DeLafield v. Jones*, Ca. Pr., C.P. 34. But inability to write is not an objection: *Baker v. Coghlan*, 7 C.B. 131. Where, in an action against a father, process was served upon his son, of the same name and appearance entered and defence made by the son, the court held that a verdict for defendant was correct, and that, whether there was collusion or not, the plaintiff could not recover against the son so as to charge the father: *Killens v. Street*, M.T. 4 Vic. A writ directed to J.S. was, by mistake served upon his son of the same name, who, a few days afterwards, gave it to the father, the defendant telling his son that the sheriff had made a blunder, and defendant at his son's request took it to an attorney, who, upon defendant's instructions, entered appearance, and afterwards put in pleas; it was held good service: *The Provincial Insurance Company of Canada v. Shaw*, 10 U.C.R. 360. In an action on a mortgage the writ was served on the mortgagor's father, who, by his son, an attorney, entered an appearance and defended the suit, and a verdict was taken against the mortgagor, the verdict was set aside because served on the wrong person, and no notice or knowledge of the proceedings were shown to have reached the defendant: *Sutherland v. Dumble*, 14 C.P. 156; see also *Walley v. McConnell*, 13 Q.B. 903. An admission of service of summons waives all technical irregularities: *Otis v. Rossin*, 2 P.R. 48. A defective service of a summons, regularly issued and in proper form is cured by the appearance of the defendant and an appearance "under protest" is unknown to the practice of the court: *Dom. Coal Co. v. Kingswell*, S.S. Co., 30 N.S.R. 397. Where personal service is not necessary, the bailiff should be particular in serving one of the three persons mentioned in this clause, and showing the *nature* of the service in the affidavit; and when served on "some grown person, being an inmate of the defendant's dwelling-house or usual place of abode, trade or dealing," his or her name, if possible, should be stated in the affidavit, and the fact that the person was grown up and was an inmate of the particular house, etc.: See Form 28. On these points, see particularly 2 U.C.L.J. 85, 86 and 104, where the mode of service is fully discussed.

It is an uncertain question whether any but a bailiff can serve Division Court process under section 54 of this Act: *Whitehead v. Fothergill*, Dra. 200. It is submitted, however, that service made by any person is good.

Where the suit is on the judgment of a court of the Province of Quebec, on a personal service made in Ontario in an action in which the cause thereof arose in Quebec, the judgment is conclusive on the merits: *Court v. Scott*, 32 C.P. 148, and cases there cited; R.S.O. c. 51, ss. 117, 118. But the courts of this province will not aid in giving force to a foreign judgment based upon grounds which would not support such a judgment here: *Swaizie v. Swaizie*, 31 O.R. 81.

Whether service of a summons from a Division Court is good is a matter peculiarly for the decision of the judge: *Waters v. Handley*,

6 D. & L. 88; *Zohrab v. Smith*, 5 D. & L. 635; see *Robinson v. Lenaghan*, 2 Ex. 333.

As to service on a corporation having its head office out of the Province, see sections 105 and 187.

As to service on partners, see section 112, sub-section 4.

If a defendant gives notice of defence, it is submitted that he would thereby waive proof of service or any irregularity of service: *Davis v. Pearce*, L.R. 5 C.P. 435; *Re Jones*, 1 L.M. & P. 65.

And if the defendant appears and contests the action at the trial, personal service is also waived: *Re Guy v. G.T. Ry. Co.* 10 P.R. 372; see also *Re Merchants' Bank v. Van Allan*, 10 P.R. 348.

Renewal of Summons.—If not served a summons expires at the expiration of twelve months from its date unless an application be made within that time for leave to serve it after, and notwithstanding the lapse of that period: Rule 25. It is not necessary that the order should be made within the twelve months so long as the application is made in time. If the judge should be absent the papers should be left with the clerk, in which case the application may be considered as made: see note *supra*, p. 144. The day of issue of the summons is included, so that it would be necessary for the plaintiff issuing a summons on the 7th June, 1900, to apply to the judge for an order for its renewal before the 6th June, 1901. The time for making the application could not be extended: see notes to section 90 *supra* p. 143; *Doyle v. Kaufman*, 3 Q.B.D. 7, 340; *Hewitt v. Barr*, (1891) 1 Q.B. 98. If satisfied that reasonable efforts have been made to effect service, or for other good reason, the judge may order that service shall be good, if made within twelve months from the date of the order, and so from time to time during the currency of the further period allowed and the writ in such case must be renewed by being marked by the clerk, on its delivery to him by the plaintiff, with the date of the day, month and year of such renewal. The original writ is then available to prevent the operation of any statute of limitations, and for all other purposes: Rule 25 (a) (b) and (c). What are "reasonable efforts" to effect service must depend on the circumstances of each case: *Tomlinson v. Goatley*, L.R. 1 C.P. 231. Where a defendant went away to avoid service and could not be found, a proper case was made out: *Smalpage v. Tonge*, 17 Q.B.D. 644. It is for the judge to determine whether the facts give him jurisdiction and the High Court will not review his decision: *Re Hibbitt v. Schilbroth*, 18 O.R. 399; *Charrington v. Witherby*, 23 Sol. Jour. 230.

Other Good Reason.—Where plaintiffs delayed service of the writ for nearly four years, awaiting the determination of another suit, which, if decided in a certain way, would have made the action useless, it was held that this was not a good reason: *Howland v. Dominion Bank*, 15 P.R. 56; 22 S.C.R. 130. "The position of the defendant should be considered, and he should not have an action hanging over him for an indefinite time, unless some good excuse for want of diligence in its prosecution be shown:" *per Osler, J.A.*, 15 P.R. 62.

But where the delay arose from the pendency of an appeal in an action between the same parties, the decision of which would affect the plaintiff's course, the order for renewal was made: *Gilmour v. Magee*, 14 P.R. 120; and where some of the defendants could not be found, and the plaintiff was in feeble health, and unable to give the matter attention, an order for renewal was confirmed: *Cairns v. Airth*, 16 P.R. 100.

Of the Judge's Order.—The original order of the judge must be delivered to the clerk. The renewal is for twelve months from the date of the order, the date of the order not being included.

As to Statute of Limitations, see notes to section 134.

General Provisions.

104. [The Judge shall, as regards the service of all summonses or other process in any matters within the jurisdiction of the Division Court, have powers to grant orders for substitutional or other service, by advertisement or otherwise, in as full and ample a manner as might be done in like cases by the High Court under the existing rules of practice. (See *Con. Rule 146*), 62 V. c. 11, s. 8.

Substitutional service.

The Existing Rules of Practice.—The following are the Consolidated Rules applicable:—

146. Where service is required, the writ may be served in any county or district in Ontario, and the service thereof shall be personal; but if it appears to the court or a judge on affidavit that the plaintiff is unable to effect prompt personal service, the court or judge may order substituted service by advertisement or otherwise.

147. Where service of a writ out of Ontario may be allowed under rules 162 to 167, and the defendant, whether a British subject or not, is, or was at the time the cause of action arose, carrying on business within Ontario, the court or a judge may, if the cause of action arose in respect of such business, make an order allowing service upon any person having the control or management of the business; and such service shall be equivalent to personal service upon the defendant.

Substitutional Service.—The object and effect of substitutional service was expressed by Mellor, J., in *Watt v. Barnett*, 3 Q.B.D. 163, at p. 186: "The object of the rule was to obviate the difficulties that the plaintiff might be exposed to by reason of the defendant's going abroad and keeping abroad and it being impossible to effect personal service, and to prevent the plaintiff's right being entirely defeated by reason of these difficulties. It was intended, in my opinion, in such cases to enable the court to order substituted service, and that when such service is directed, it should have all the effects of personal service." See *Re Urquhart*, 24 Q.B.D. 723, at p. 726.

The right which every defendant has, to be served personally with the summons, can only be taken away by statutory enactment: see *Thorburn v. Barnes*, L.R. 2 C.P. 384; *Re Pollard*, L.R. 2 C.P. 106; *Ferguson v. Carman*, 26 U.C.R. 26; *Maxwell on Statutes*, 2nd ed., 443.

The rule governing substitutional service seems to be that where, at the time of the issue of the writ, there could at law have been personal service of it upon the defendant sought to be served, but circumstances prevented such service being made, then substitutional service may be allowed. But if at the time the writ was issued, personal service could not at law have been made, then substitutional service cannot be ordered: *Field v. Bennett*, 56 L.J.Q.B. 89; *Hillyard v. Smyth*, 36 W.R. 7; *De Bernales v. New York Herald*, (1893) 2 Q.B. 97 (note); *Jay v. Budd*, (1898) 1 Q.B. 12, *per Rigby, L.J.*, at p. 17.

Affidavit for Substitutional Service.—For formalities and general requirements of affidavits, see notes to section 90. For form of affidavit see form 258. The affidavit should show such facts as would satisfy the judge that all efforts have been made which could be reasonably expected to serve the defendant or ascertain his whereabouts, and should also show what the efforts were: *Skegg v. Simpson*, 2 DeG. & Sm. 454; *Lush's Prac.*, 3rd ed., 375; and that all practicable means of effecting personal

service have been exhausted, and that such service, or at any rate "prompt personal service" is impossible: *Forth v. Bush*, 9 Jur. N.S. 431; *Brooker v. Smith*, 4 L.T. 545; *Mander v. Falcke*, (1891) 3 Ch. 388. It should be shown where the defendant resided or does reside, what business he had been or was engaged in, what specific efforts had been made to serve him and why it was not done, and, if founded on the fact that the defendant has absconded, it should be stated, and whether or not he had any, and if so, what friends or relations residing in the Province; see *Stephen v. Dennie*, 3 U.C.L.J. 69; *Flower v. Allen*, 2 H. & C. 688, *per Bramwell, B.*, at p. 694; *Irving v. Strait*, 1 Ch. Chamb. 2.

It would not be enough to show that defendant had gone abroad and had no private residence in the Province: *Kitchen v. Wilson*, 4 C.B.N.S. 483; it is necessary to show that the defendant is evading service or that his whereabouts are unknown: *Robertson v. Mero*, 9 P.R. 510; *Adler v. Benjamin*, 1 T.L.R. 308; *Wilding v. Bean*, (1891) 1 Q.B. 100; *Jay v. Budd*, (1898) 1 Q.B. 12, at p. 18.

If the defendant is evading service, the affidavit should state the deponent's belief to that effect, giving the facts upon which the inference is founded.

The manner in which it is proposed that service is to be effected, and that there is a reasonable probability of the summons coming to the knowledge of the defendant, should be shown: *Cook v. Dey*, 2 Ch.D. 118; *Copes v. Brewer*, 24 W.R. 40; *Furber v. King*, 50 L.J. Ch. 496.

The Scope and Effect of the Section.—Before 57 Vic. c. 23, ss. 12, 13 and 14 (now section 87), the process of Division Courts had no effect against a man residing out of the Province: *Ontario Glass Co. v. Swartz*, 9 P.R. 252, unless he had, in Ontario, an office and an agent doing business on his behalf, or had absconded. And although section 87 may have been intended to cover such cases, it does not appear to confer any additional power to order substitutional service in any case where it would previously have been improper to do so. But under this section the widest possible powers are conferred, and it would appear that by the combined effect of the section and the powers and practice of the High Court incorporated with it, an order may be made for substitutional or other service not only of the summons but any other process, in any manner which the judge in his discretion may direct: see *Jay v. Budd*, (1898) 1 Q.B. 12, at p. 16; *Whitley v. Honeywell*, 24 W.R. 851. The word "process" is defined to mean any summons, writ, or warrant issued under the seal of the court or a judge's summons or order: Rule 2 (15).

When Substitutional Service cannot be Ordered.—The principle of substitutional service is thus stated by Lord Esher, M.R.: "I do not see how substitutional service can be ordered when the conditions are such that original personal service could not possibly be effected. The expression 'substituted service' implies in itself that the original service could, under certain circumstances, possibly be effected": *Re Easy, Ex parte Hill*, 13 Q.B.D. 538. See *Field v. Bennett*, 56 L.J.Q.B. 89; *Fry v. Moore*, 23 Q.B.D. 395; *Hillyard v. Smyth*, 36 W.R. 7; *Wilding v. Bean*, (1891) 1 Q.B. 100; *De Bernales v. New York Herald*, (1893) 2 Q.B. 97 (n); *Sloman v. Government of New Zealand*, 1 C.P.D. 563; *Worcester Banking Co. v. Firbank*, (1894) 1 Q.B. 784; *O'Connor v. The Star Newspaper Co.*, 30 L.R. Ir. 1. Substitutional service will not be ordered against a foreign sovereign: *Mighell v. Sultan of Johore*, (1894) 1 Q.B. 149; or against a colonial government: *Sloman v. Government of New Zealand*, 1 C.P.D. 563; or against a foreign ambassador: *Musurus Bey v. Gadban*, (1894) 2 Q.B. 352.

Cases Where Substitutional Service Ordered.—The principle on which the court will order substituted service is that the process so ordered to be served will reach the person served: *Whyte-Melville v. Whyte-Melville*, 55 L.T. Jour. 7; or that it is likely to come to his knowledge: *Hope v. Hope*, 19 Beav. 327; 4 De G. M. & G. 328. Therefore, such service will be allowed upon persons authorized to accept that particular service or who will communicate the process to the defendant: *Ib.*; *Re Slade*, 30 W.R. 28. For instance, such service has been allowed on solicitors who have acted for defendant in the subject matter of the action: *Hornby v. Holmes*, 4 Hare, 306; *Hope v. Hope*, 19 Beav. 327; *Jay v. Budd*, (1898) 1 Q.B. 12; on a former solicitor of the defendant: *Watt v. Barnett*, 3 Q.B.D. 3, 363; see *The Pommerania*, 4 P.D. 195; on the defendant by mail in a letter addressed to him at his last address: *Dymond v. Croft*, 3 Ch. D. 512; on defendant's managing clerk at his offices and upon his solicitors: *Armitage v. Fitzwilliam*, W.N. (1875) 238; *Jay v. Budd*, (1898) 1 Q.B. 12; see *Tottenham v. Barry*, 12 Ch. D. 797; on a special agent of defendant: *Hobhouse v. Courtney*, 12 Sim. 140; on general agents: *Jones v. Cargill*, 11 L.T. 566; on wife when husband out of the jurisdiction: *Bank of Whitehaven v. Thompson*, W.N. (1877) 45; on a person in communication with the defendant: *Dicker v. Clarke*, 11 W.R. 625; on relations and by advertisement: *Wolverhampton (&c.) Co. v. Bond*, 29 W.R. 599; see *Coulburn v. Carshaw*, 32 W.R. 33. In an action against an assignee in insolvency who had absconded, service was allowed on an inspector of the estate: *London & Can. L. & A. Co. v. Thompson*, 8 P.R. 96. In an action against husband and wife and the husband could not be found, service was directed to be made by advertisement, subject to the direction of the registrar: *Whitley v. Honeywell*, 24 W.R. 851; and in another case by serving the defendant's wife, by leaving a copy at the house and by advertisement in two local papers: *Mellows v. Bannister*, 31 W.R. 238; *Waters v. Waters*, 24 W.R. 190.

An order was made for service on a foreigner out of jurisdiction of notice of writ by registered letter sent to a trustee of the defendant and to his wife: *Ditton v. Bornemann*, 3 T.L.R. 3.

An order was made for substitutional service of a writ against a defendant whose christian name was unknown and was left blank in the writ: 35 Sol. J. 17.

Evading Service.—Where defendant evades service an order may be made for service by leaving a copy of the writ at his office and last known lodgings and by advertisement: *Cook v. Dey*, 2 Ch. D. 218; *Crane v. Jullion*, 2 Ch. D. 220; *Bank of Whitehaven v. Thompson*, W.N. (1877) 45; *Hamilton v. Davies*, W.N. (1880) 82.

When it was clear that defendant was evading service, service was ordered by leaving a copy of the writ at defendant's dwelling house and by copies being sent to him by mail: *Copes v. Brewer*, 24 W.R. 40. See also *Trent Cycle Co. v. Beattie*, 15 T.L.R. 176; *Re Urquhart*, 24 Q.B.D. 723.

Where defendant is out of the jurisdiction and his whereabouts are unknown, and there is no one in the jurisdiction who is likely to be in communication with him, service may be ordered by advertisement alone: *Hartley v. Dilke*, 35 L.T. 706; or by advertisement and mailing copies of the writ to different addresses at which defendant has been heard of: *Stimson v. Stimson*, 6 Gr. 379.

Where defendant was out of the jurisdiction at the time of the issue of the writ, substitutional service may be ordered if the court is satisfied that he went out of the jurisdiction to evade service: *Re Urquhart*, 24 Q.B.D. 723; see *Fry v. Moore*, 23 Q.B.D. 395; *Watt v. Barnett*, 3 Q.B.D. 183 at p. 186; *per Esher, M.R.*, *Wilding v. Bean*, (1891) 1 Q.B. 100, at p. 103; see *Jay v. Budd*, (1898) 1 Q.B. 12.

The time within which defendant may dispute the plaintiff's claim will run from the date on which service is effected as set forth in the order or from the date of the publication of the advertisement which ever is the later: *Johnson v. Moffatt*, W. N. (1875) 248.

Subpoena.—A witness is not liable to attachment for disobedience to a subpoena served substitutionally pursuant to an order: *Barber v. Adams*, 16 P.R. 156. An order should not be made for substitutional service of a subpoena upon an officer of a litigant corporation: *Mills v. Mercer Co.* 15 P.R. 281.

Service on Lunatic.—An order for substitutional service will not be made when the defendant is a lunatic, and when his relations or keeper have refused admission to him: *Ridgway v. Cannon*, 2 W.R. 473; *Holmes v. Service*, 15 C.B. 293; *Williamson v. Moggs*, 28 L.J. Ex. 5; but if the summons is mentioned to him it would have sufficiently "come to the knowledge" of the defendant to warrant an order being made: *Kimberley v. Alleyne*, 2 H. & C. 228; *Ranley v. Wilson*, L.R. 16 Eq. 576.

Judgment should not, however, be given against a lunatic without first appointing a guardian *ad litem*: *Daniels Ch. Prac.* 160; *Crawford v. Crawford*, 9 P.R. 178; unless a committee has been appointed, and in such case, the committee is a necessary party. If the lunatic is confined in a public asylum, service may be made on the Inspector of Prisons and Public Charities, but it is, nevertheless, necessary to have a guardian *ad litem* appointed: R.S.O. c. 317, s. 55.

Order for Substitutional Service.—For form of order; see form 271. See also *Crane v. Jullion*, 2 Ch. D. 220; *Cook v. Dey*, 2 Ch. D. 218. In these cases the court refused to give directions as to the time for appearance as the ordinary time allowed for appearance will run from the service of the writ or issue of the advertisement, whichever is the latest in date. When the order is for service out of the jurisdiction it should fix the time for entering defence. The order should prescribe what is to be done instead of personal service; and the plaintiff's proceedings after the order must strictly conform to it, and to the terms which the judge has imposed: *Weeks v. Wray*, L.R. 3 Q.B. 212.

Setting Aside Order.—An order for substitutional service, and judgment by default obtained thereon, may be set aside on terms: *Watt v. Barnett*, 3 Q.B.D. 363.

An application may, it seems, be made to set aside the order on affidavits contradicting those on which it was obtained, and not disclosing any defence on the merits: *Hall v. Scotson*, 9 Ex. 238; *Thelwall v. Yelverton*, 16 C.B.N.S. 813.

If the order was properly granted it would not be rescinded in consequence of an event which subsequently occurred: *Borradaile v. Nelson*, 14 C.B. 655.

Service out of Jurisdiction.—Section 87 (2), (3), (4) provides for service of the summons out of jurisdiction.

Service of
process,
etc., on cor-
porations.

105.—(1) Every summons or process issued out of a Division Court against a corporation, firm or individual whose chief place of business is not within the Province, and all subsequent papers and proceedings in the action, or proceeding in which the summons or process has been issued, may be served on the agent of the corporation, firm or individual whose office or place of business as such agent is

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either within the division in which the summons or process issued or is nearest thereto. R.S.O. 1887, c. 51, s. 101 (1); 52 V. c. 12, s. 11.

(2) For the purpose of this section the word "agent" shall be held to include:

Interpreta-
tion
"Agent."

- (a) In the case of a railway company a station-master having charge of a station belonging to the railway company;
- (b) In the case of a telegraph company, a person having charge of a telegraph office belonging to the telegraph company, and
- (c) In the case of an express company, a person having charge of an express office belonging to the express company. R.S.O. 1887, c. 51, s. 101 (2).

Corporation, Firm or Individual.—The provisions of this section originally extended only to corporations not having their chief place of business in the province. Formerly service of a summons or other process or proceedings could not be made upon corporations or persons residing out of but carrying on business within Ontario: *Re Ahrens v. McGilligat*, 23 C.P. 171; *Westover v. Turner*, 26 C.P. 510; *Re Guy v. The G.T. Ry. Co.* 10 P.R. 372; *Berkley v. Thompson*, 10 App. Cas. 45; *Ontario Glass Co. v. Swartz*, 9 P.R. 252; *R. v. Lightfoot*, 6 E. & B. 822. In 1884, provision was made by sections 2, 3 and 4 of the Division Courts Amendment Act for service of garnishment proceedings against such corporations; in 1885 the provision was extended to "every summons or process issued out of a Division Court" and to "all subsequent papers and proceedings in the action or proceeding in which the summons or process has been issued." In 1887 the provisions of section 88 were passed providing that in cases against such corporations when the cause of action arises partly in one division and partly in another the action might be brought in either division. In 1889 the provisions of this section were made to include "a firm or individual" having its chief place of business without the province; and in the revision of the statutes in 1897 the section assumed its present form.

The question as to when and how the Division Courts have obtained jurisdiction in such cases has never apparently been considered. In this respect it has been said that these courts are endowed with greater powers than the High Court has: *Russell v. Cambefort*, 23 Q.B.D. 526; *Dobson v. Festi*, (1891) 2 Q.B. 92; *Heineman v. Hale*, (1891) 2 Q.B. 83, and cases cited in notes to section 87. In 1897, the provisions of section 87 were enacted giving to Division Courts jurisdiction "in cases where it is by this Act provided that a claim may be entered or an action brought, or that any person or persons may be sued" notwithstanding that the residence of the defendant is at the time of bringing the action out of the Province of Ontario, and this provision has been held to apply to any action within the competency of the Division Courts: *Hicks v. Jacobs*, 19 O.L.T. 88.

Agent.—Rule 21 is almost the exact counterpart of sub-section 1 of this section and adds nothing to the definition of the word "agent" given here.

The local agent of a foreign insurance company who had power only to receive and transmit applications was held to be an "agent" within

this section: *Simpson v. Chase*, 14 P.R. 280. But a limited agency for taking orders merely for transmission is not a carrying on business at the agent's office: *Grant v. Anderson*, (1892) 1 Q.B. 108; see *Baillie v. Goodwin*, 33 Ch. D. 604; *Worcester Banking Co. v. Firbank*, (1894) 1 Q.B. 784.

And the term "agent" means at least some person who is an agent of the corporation, who transmits or carries on here, or controls or manages here some part of the business which the defendants profess to do or for which they are incorporated: *Murphy v. Phoenix Bridge Co.*, 18 P.R. 406, 495.

"Carrying on business" means the possession within the jurisdiction of a place of business held in the name of the firm by a partner or by a person or persons in the pay of the firm: *Worcester Banking Co. v. Firbank*, (1894) 1 Q.B. 784; *Singleton v. Roberts*, 70 L.T. 687.

Chief Place of Business.—It has been held that "the home of a company must be taken to be that place which is occupied as such, where their profits come home to them, whence orders emanate and where the chief officers of the company are to be found:" *per Wilde, B.*, *Adams v. The G.W. Ry. Co.*, 6 H. & N. 404, at p. 409, and this it is submitted is also a good definition of the expression "chief place of business" as applied to a company and that the same definition would be applicable to a "firm or individual": see also *Franklin v. Owen*, 15 C.L.T. 105, 158, 185; notes to section 84.

An action for damages alleged to have occurred in British Columbia against a railway company whose head office is out of Ontario, but who carries on business within the province may be maintained in this province: *Tytler v. The C.P. Ry. Co.*, 29 O.R. 654. A chartered bank doing business in Ontario is deemed to be resident there for the purposes of the law as well as for the transaction of its business: 53 Vic. c. 51, s. 64 *et seq.* (D.); *County of Wentworth v. Smith*, 15 P.R. 372; but an ordinary foreign corporation, although having an agency in Ontario, is not so resident: *Parker v. Odette*, 16 P.R. 69; see also *Boswell v. Piper*, 17 P.R. 257; *Braun v. Davis*, 14 C.L.T. 194; 9 Man. L.R. 534, and other cases cited in notes to section 179; *Le Tailleur v. S.E. Ry. Co.*, 3 C.P.D. 18; notes to section 84.

Served on the Agent.—Except in the cases enumerated in the sub-sections, it is submitted that the "agent" would mean the person managing the branch establishment.

Office or Place of Business.—The office or place of business must be that which he occupies as such agent, i.e., the branch establishment: see *Sewrey v. Burke*, 16 C.L.T. 322.

Nearest Thereto.—See notes to section 85.

Sub-section 2.—The definition here given of the word "agent" is not intended to define the only class of agents that may be served. Rule 2 (22) is exactly identical with this sub-section.

A female, married or single, a minor or an alien, could be an agent under this section: see *Watkins v. Vince*, 2 Stark, 368. See section 190 (3).

As to service see section 103 and notes thereto.

Postage.

106. The postage on papers required to be served out of the division, and sent by mail for service, shall be costs in the cause. R.S.O. 1887, c. 51, s. 102.

Costs in the Cause.—The costs of all proceedings "which form part of the regular proceedings in the cause" are generally understood as "costs in the cause;" and the party entitled to costs receives them from the opposite party: *Cameron v. Campbell*, 1 P.R. 173, *per Burns, J.*; see also *Pugh v. Kerr*, 6 M. & W. 17; *Copeland v. Blenheim*, 11 P.R. 54.

Postages of Papers.—All papers sent from one Division Court to another, or to a party to a suit, or to the judge, and all notices sent to the clerk, shall be prepaid and registered, and when papers are sent to the judge postage stamps for return postage must in all cases be enclosed; the postage and registration to be costs in the cause: Rule 300; see also Rule 169. By the preservation of the registration receipt the clerk is in all cases able to prove the mailing of a letter at the time shown thereby: see Rule 169. Upon being furnished with the necessary postage the clerk is required to answer promptly all enquiries made by parties to suits: Rule 153.

107. Where there is no Bailiff of the Court in which the action is brought, or when the Bailiff has been suspended by order of the Judge, or where any summons, execution, subpoena, process or other document, is required to be served or executed elsewhere than in the division in which the action is brought, it may, in the election of the party, be directed to be served and executed by the Bailiff of the division in or near to which it is required to be executed, or by such other Bailiff or person as the Judge or Clerk, issuing the same, orders, and may, for that purpose, be transmitted by post, or otherwise, direct to such Bailiff or person, without being sent to or through the Clerk. R.S.O. 1887, c. 51, s. 103.

How process, etc., may be executed at distance or when bailiff suspended.

The Bailiff of the Division.—A writ of execution cannot be issued to the bailiff of any other Division Court which is not in the same county: Rule 124. If an execution is to be executed in another county the proceedings would be by transcript under section 223. No execution or attachment may be executed out of the limits of the county over which the judge of the court from which it issues has jurisdiction, except in cases where the sitting of the court is nearest to defendant's residence, under section 85: Section 220.

The bailiff is not, in the absence of an order by the judge or clerk, bound to serve or execute the documents unless they are to be executed in or near to his division: *Davy v. Johnson*, 31 U.C.R. 153.

The bailiff and his sureties are as responsible for his acts as if the proceeding was in his own court: see section 108.

The judge's or clerk's order should be endorsed on the writ if an execution is directed to any other person than the bailiff of the court out of which it issues.

As to clerk's duties on receiving summonses for service from other divisions see Rule 154.

108. In cases mentioned in the last preceding section it shall be the duty of the Bailiff to serve and execute all summonses, executions, subpoenas, process and other documents, and make return thereof with reasonable diligence, and to pay over, on demand, all moneys by him levied or

Duties of bailiff and liability of sureties.

received thereon; and for neglect or default therein, in addition to any other remedy against the Bailiff, he and his sureties shall be liable, on their covenant to the parties aggrieved, as if the summonses, executions, subpoenas, process and documents had issued from or related to some actions in the Court of which he is Bailiff. R.S.O. 1887, c. 51, s. 104.

Return.—The return must be made by the clerk who issued the process: Rule 124.

Reasonable Diligence.—What is reasonable diligence must depend on the circumstances of each case: Stroud, 230, 653; see also notes to section 104 as to "Reasonable efforts."

On Demand.—A demand must be made for moneys collected: see *Gibbs v. Southam*, 5 B. & Ad. 911. See notes to section 36, title, "*Scope of the Covenant*."

No clerk or bailiff can receive money from a defendant, primary debtor or garnishee on a summons merely forwarded for service: Rule 154. See also rule 199.

All moneys are payable to the parties at the clerk's office: Rule 247.

Moneys recovered in an action entered by a solicitor or agent must not be paid out to the parties beneficially interested without notice to such solicitor or agent: Rule 165.

Other Documents.—As to service of summonses, subpoenas, process and other documents, see section 103 and notes thereto.

Clerk to
prepare
affidavits of
service, etc.

109. The Clerk shall prepare an affidavit of service of every summons issued out of his Court, or sent to him for service, stating how the same was served, the day of service, and the distance the bailiff necessarily travelled to effect service, and the affidavit shall be annexed to or indorsed on the summons; but the Judge may require the Bailiff to be sworn in his presence, and to answer such questions as may be put to him touching any service or mileage. R.S.O. 1887, c. 51, s. 105.

Affidavits of Service of All Summonses.—For necessary formalities of all affidavits see Rules 262 to 268, and notes to section 90 *ante* p. 144.

If the service is properly made a defect in the affidavit would not invalidate it. A fresh affidavit could be made: see *Fee v. McIlhargey*, 9 P.R. 329, where it was held that the Division Court rules are not imperative. But all affidavits should be carefully prepared: see *Jacomb v. Henry*, 13 C.P. 377. For forms of affidavits of service see Forms 28 to 31.

Distance Necessarily Travelled.—If less than a mile, mileage is *not* chargeable, for the tariff only provides for "*every mile*" necessarily travelled. If the distance travelled is greater than any given number of miles, and not as much as the next succeeding number, the part of a mile travelled is *not* to be reckoned. Mileage should be calculated from the point at which the officer received the paper. If two or more defendants, the mode of determining the distance travelled is by estimating it first to the place where the first defendant is served, then from there to the next, and so on; and the aggregate distance so travelled is the correct measure. It would be improper to charge mileage to each defendant's place: *Corporation of Haldimand v. Martin*, 19 U.C.R. 178.

109 (a). No affidavit in any action in a Division Court, sworn before the Solicitor or Agent of the party on whose behalf it was made, or before the clerk or partner of such Solicitor or Agent, shall be used. 62 V. c. 11, s. 7.

The Solicitor or Agents.—See C.R. 522.

For requirements of affidavits see notes to section 90. When the plaintiff was a solicitor but was represented by independent solicitors, an affidavit sworn before his own clerk, who was a commissioner, was held sufficient: *Foster v. Harvey*, (No. 1) 11 W.R. 890.

Partners.

110. In case of a debt or demand against two or more persons, partners in trade or otherwise jointly liable, but residing in different divisions, or one or more of whom cannot be found, one or more of such persons may be served with process, and judgment may be obtained and execution issued against the person or persons served, notwithstanding others jointly liable have not been served or sued, reserving always to the person or persons against whom execution issues his or their right to demand contribution from any other person jointly liable with him. R.S.O. 1887, c. 51, s. 106.

One or more of persons jointly liable may be sued.

Debt or Demand.—The section applies only to debts and demands. It would not extend to claims for tort. As between tortfeasors there is no right of contribution: *Corporation of Vespra v. Cook*, 26 C.P. 182; *Willcocks v. Howell*, 8 O.R. 576; see *Palmer v. The Wick Steam Shipping Co.*, (1894) A.C. 318; *Moxham v. Grant*, (1899) 1 Q.B. 480 at p. 484.

Set-off.—Where a plaintiff avails himself of the provisions of this section and proceeds against only one or more of the several persons jointly liable, the defendant sued may avail himself of any set-off, counterclaim or other defence to which he would be entitled if all the persons liable were made defendants: Rule 282.

The rule follows the decisions that a plaintiff cannot by suing only one of several persons jointly liable, prevent a set-off, counterclaim or other defence, which all or some would have had, from being set up: *Stackwood v. Dunn*, 3 Q.B. 822; see *Toplis v. Grane*, 5 Bing. N.C. 636; and where one partner only is sued he may plead a partnership set-off against a partnership debt: *Rice v. Shute*, 2 W. Bl. 697. But a debt due from one partner cannot be set-off against a debt due the firm: *Gordon v. Ellis*, 2 C.B. 821.

Jointly Liable.—A judgment under this section, against one or more of several joint debtors, even without satisfaction, is a bar to any claim against the others: *King v. Hoare*, 13 M. & W. 494; even where the judgment is by consent in an action to which the other joint debtor is a party: *McLeod v. Power*, (1898) 2 Ch. 295; but where judgment is recovered by default against one defendant the action may be proceeded with and a judgment recovered against the others: *Dueber Watch Case Co. v. Taggart*, 26 A.R. 295. But an unsettled judgment on a cheque given by one joint contractor in respect of the joint debt is no bar to an action against the other joint contractor on the original debt: *Wegg-Prosser v. Evans*, (1894) 2 Q.B. 101; *Weall v. James*, 68 L.T. 54; *Wilson*

v. Balcarres, (1893) 1 Q.B. 422; Robinson v. Geisel, (1894) 2 Q.B. 685. Where the liability is joint and several, or where several persons are independently and collectively bound to the same obligation, the recovery of judgment without satisfaction against one is no bar to an action against the others: *Drake v. Mitchell*, 3 East 251; 7 R.R. 449; *King v. Hoar*, 13 M. & W. 494; *Bermondsey v. Ramsey*, L.R. 6 C.P. 247; *Re Davison*, 13 Q.B.D. 50; see also 36 Alb. L.J. 245, 265. A partnership debt is not joint and several but merely joint: *Campbell v. Farley*, 18 P.R. 97; *Re Hodgson*, 31 Ch. D. 177; *Kendall v. Hamilton*, 4 App. Cas. 516.

Where one or more only of several joint-debtors is sued, he can set up the non-joinder of the other co-defendants, except where the defendants reside in different divisions, or when one or more of them cannot be found.

Judgment against one or more joint-debtors cannot be set aside even with the consent of the judgment debtor, so as to evade the rule, making it a bar again. See others: *Hammond v. Schofield*, (1891) 1 Q.B. 453; *Toronto Dental Mfg. Co. v. McLaren*, 14 P.R. 89; see *McLeod v. Power*, (1898) 2 Ch. 295.

Contribution.—"Contribution" here means the performance by each of two or more persons, jointly liable, by contract or otherwise, of his share of the liability: *Wharton*, 177. Where a note, however, was payable in instalments, it was held that one surety who paid an instalment was entitled immediately to contribution from the others: *Re Macdonald*, W.N. (1888) 130. See *Molson's Bank v. Heilig*, 25 O.R. 503; *Ray v. Isbister*, 22 A.R. 12; 22 S.C.R. 79. It frequently arises between sureties. See notes to section 35, title, "*Scope of the Covenant*." See also notes to section 112.

A defendant or co-surety cannot compel an assignment to be made to him of the judgment by the plaintiff, unless the whole of the debt has been paid: *Re McLean v. Jones*, 2 C.L.J. 206; *Ewart v. Latta*, 4 M. H.L. 983; *National Fire Insce. Co. v. McLaren*, 12 O.R. 682; see also *Brown v. Gossage*, 15 C.P. 20. The right to an assignment can only be enforced by action: *Phillips v. Dickson*, 8 C.B.N.S. 391; but even without assignment, the rights of the creditor are possessed by the party who pays him: *Re McMyn*, *Lightbown v. McMyn*, 33 Ch.D. 575; but cannot be enforced in the name of the creditor without an indemnity: *Potts v. Leask*, 36 U.C.R. 476; and where defendants are partners, and one of them pays the debt, he can only enforce the judgment to the extent that anything may be found due to him on the taking of accounts between them: *London & Can. L. & A. Co. v. Morphy*, 14 A.R. 577; *Honsinger v. Love*, 16 O.R. 170.

Bailiff may seize property of firm on certificate of judge.

111. Where a judgment has been obtained against such partner, and the Judge certifies that the demand proved was strictly a partnership transaction, the Bailiff, in order to satisfy the judgment and costs and charges thereon, may seize and sell the property of the firm, as well as that of the defendants who have been served. R.S.O. 1887, c. 51, s. 107.

The Property of the Firm.—The sale of the interest of a person against whom judgment has not been recovered is authorized, and the section must therefore be construed strictly. The judge should certify the fact that the demand for which he gives judgment has been proved to be "strictly a partnership transaction of the firm of X. & Y."

Every member of a partnership has apparent authority to do for the firm whatever is necessary for the transaction of its business in the way in which that business is ordinarily carried on by other people: *Lindley on Part.*, 124, 169. This section, however, requires more than apparent authority. The transaction must be strictly one of the partnership.

The goods of the firm could be seized on an execution against one of the partners without the aid of this section, but only the judgment debtor's interest in them could be sold; *Johnson v. Evans*, 7 M. & G. 240; *Lee v. Rapelje*, 2 U.C.R. 368; *Helmore v. Smith*, 35 Ch.D. 436; *Harrison v. Harrison*, 28 C.L.J. 216; but he could not take the goods out of the other partner's possession: *Burnell v. Hunt*, 5 Jur. 650.

Such Partner.—The section extends only to actions of debt or demand where partners reside "in different divisions or one or more cannot be found:" section 110, incorporated with this section by the word "such:" see *Eastern Counties Ry. Co. v. Marriage*, 6 H. & N. 931; *Pearson v. Ruttan*, 15 C.P. 89.

Suing Partners in Firm Name.—The section has no application where partners are sued in their firm name under section 112 (4).

Adding Parties.

112. The following provisions shall apply to and in respect of any action brought in a Division Court:

Adding party defendant, primary debtor or garnishee.

1. The Judge may, at any time after action commenced, upon the application of either party, and upon such terms as may appear to him to be just, order that the name of any party who ought to have been joined in the action as a defendant, primary debtor or garnishee, shall be added as a party defendant, primary debtor or garnishee.

2. If it appears to the Judge, either before or at the trial of an action, that any party ought to be added as a party defendant, primary debtor or garnishee, in order that the Court may settle all rights and questions involved in the action, the Judge may order such party to be added accordingly.

3. Every person whose name is so added as a defendant, primary debtor or garnishee, shall be served with a copy of the summons, the original summons being first properly amended, and the proceedings against such added defendant, primary debtor or garnishee, shall be deemed to have been commenced from the date of the order making him a party defendant, primary debtor or garnishee; but if the application to add any party as a party defendant, primary debtor or garnishee be made at the trial, the Judge may make the order in a summary manner, and may dispense with the service of a copy of the summons if such defendant, primary debtor or garnishee, or his solicitor, consents thereto, upon

Service on parties added.

such terms as to costs or an adjournment of the trial, as to the Judge shall appear just. R.S.O. 1887, c. 51, s. 108 (1-3); 52 V. c. 12, s. 12.

Service on
partners.

4. Any two or more persons claiming, or being liable as co-partners may sue, or be sued in the name of the respective firms, if any. Where partners are sued in the name of their firm, the summons may be served on one or more of the partners and subject to the provisions in the next two sub-sections contained, each service shall be deemed good service upon the firm; but the affidavit of the service of the summons shall state the name of the partner served. Any party may, at any time before or after judgment, apply to the Judge for an order directing a statement to be furnished of the names of all the persons who are co-partners in any firm which is a party to the action by the firm named.

Execution
against
partners.

5. Where a judgment is against partners in the name of the firm, execution may issue in the manner following:

- (a) Against any goods of the partners;
- (b) Against the goods of any person who has admitted in the notice of dispute or defence filed that he is a partner, or who has been adjudged a partner;
- (c) Against any person who has been served as a partner with a copy of the summons and who has failed to appear.

Adding
partners as
defendants.

6. Upon the trial of an action against a firm, if the plaintiff is desirous of obtaining a judgment against the individual partners, other than the one served with a copy of the summons, and in addition to his judgment against the firm, he may procure the addition of the remaining partners as defendants under sub-sections 1 and 3 of this section, and thereafter proceed to judgment against them in the action as in other cases. R.S.O. 1887, c. 51, s. 108 (4-6).

Adding Parties.—Before this provision was made, there appeared to be no power in cases in the Division Court to add a party defendant: *Barber v. Bingham*, 20 C.L.J. 65; *Building and Loan Assn. v. Heimrod*, 19 C.L.J. 250. Now, if the judge considers it necessary for the purpose of settling all the rights and questions involved in the action, that any person or persons should be added as defendant or defendants, or as primary debtor or garnishee, it is his imperative duty to make all necessary amendments for that purpose. But the power here given should be exercised in accordance with the principles upon which the old plea in abatement would have succeeded or failed: *Wilson v. Balcarres*, (1893) 1 Q.B. 422.

Where one joint contractor is sued, he has, subject to the provisions of section 110, the right to have his co-contractor joined as defendant: *Kendall v. Hamilton*, 4 App. Cas. 504; *Campbell v. Farley*, 18 P.R. 97; *Pilley v. Robinson*, 20 Q.B.D. 155; *Robb v. Murray*, 13 P.R. 397; *Gildersleeve v. Balfour*, 15 P.R. 293. But if it is shown that any good reason exists for not joining the co-contractor the action may be allowed to proceed without adding him as a defendant: *Wilson v. Balearres*, (1893) 1 Q.B. 422; *Robinson v. Geisel*, (1894) 2 Q.B. 685.

Misjoinder and Nonjoinder.—No action or matter will be defeated by reason of the misjoinder or nonjoinder of parties, and the judge may, in every action or matter, deal with the matters in controversy so far as regards the rights and interests of the parties actually before him. The judge may at any stage of the proceedings, either upon or without the application of either party, and in such terms as may be just, order that the names of any parties improperly joined whether as plaintiffs or as defendants, be struck out, and that the names of any parties be added, whether plaintiffs or defendants who ought to have been joined, or whose presence before the judge may be necessary in order to enable him effectually and completely to adjudicate upon and settle all the questions involved in the action or matter. No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff and any disability without his own consent in writing thereto. Every person so added as defendant shall be served with a copy of the order so adding him, and the proceedings against such party shall be deemed to have begun only on the service of such order: Rule 216.

Making persons parties to an action whether as plaintiffs or defendants who are not properly parties to the relief claimed is misjoinder. Joining too many persons as plaintiffs will not create any practical difficulty. If a person should be improperly joined as a defendant as if he were not properly a party to the relief claimed by the plaintiff, he may move to have his name struck out of the proceedings and thus relieve himself of the expense of defending the action: *Carter v. Clarkson*, 15 P.R. 379.

Adding or Substituting a Party as Plaintiff.—When an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the court or judge, if satisfied it has been commenced through a *bona fide* mistake and that it is necessary for the determination of the real matter in dispute so to do, may order any other person or persons to be substituted or added as plaintiff or plaintiffs upon such terms as may seem just, but no person shall be added or substituted as plaintiff without his own consent: Rule 207.

It has been said that these rules were not intended to confer upon the judge unlimited discretion to remodel proceedings: *per* Miller, J., *Turquand v. Fearon*, 4 Q.B.D. 280; and that the object of the provision is not "that a party's case should be so framed as to succeed, but that it should be so framed that it can be adjudicated upon by the court, whether in his favor or against him;" *per* Fry, J., *Long v. Crossley*, 13 Ch. D. 388.

The rule gives the judge discretion which he will, it is submitted, exercise only on notice to the opposite party: see *Tidsley v. Harper*, 3 Ch. D. 377. It is not intended to apply where parties sought to be made defendants are persons against whom the plaintiff did not desire to prosecute any claim and whom the defendant only wishes to add for his own convenience, and it should be applied strictly: *Norris v. Beazley*, 2 C.P.D. 80 at p. 84; *Moser v. Marsden*, (1892) 1 Ch. 487; *Re Birmingham Land Co. v. London & N.W. Ry. Co.* 34 Ch. D. 261; see *Re Harrison*, (1891) 2 Ch. 349 at p. 353.

The requisite facts as set forth in the rule should be made to appear to the judge either by affidavit or by oral evidence at the trial. The "real matter in dispute" has reference to the action commenced, and no order could be made for the addition of a plaintiff who would not be a proper party to that action or to one which the plaintiff in that action could not maintain: *Tinning v. Bingham*, 16 P.R. 110; *New Brewery Co. v. Hannah*, W.N. (1877) 35. Before the Division Court rules of 1893 it was held that a plaintiff could not be added either at the trial or at any other time: *Stewart v. Moore*, 9 U.C.L.J. 82. A mistake in law is within this rule: *Duckett v. Gover*, 6 Ch. D. 82. But there must have been a *bona fide* mistake: *Clowes v. Hilliard*, 4 Ch. D. 413. A new plaintiff cannot be substituted for the original plaintiff except by consent of the latter: but in a proper case the court will add a plaintiff and give him the conduct of the action: *Emden v. Carte*, 17 Ch. D. 169.

A defendant may be added at the trial: *Gandy v. Gandy*, 30 Ch. D. 57; but not usually after judgment: *Atty.-Gen. v. Birmingham (Cor.)*, 15 Ch. D. 423; *Hurst v. Hurst*, 21 Ch. D. 278; though it may be done under special circumstances: *Adams v. Watson Manufacturing Co.*, 15 O.R. 218; 16 A.R. 2; *Re Mason, Turner v. Mason*, W.N. (1883) 134. And a defendant may be struck out even after delivery of defence: *Vallance v. Birmingham Land Cor.*, 2 Ch. D. 369.

Where two or more parties are jointly liable and the plaintiff sues only some or one of them, those sued are entitled as of right to have all the others within the jurisdiction added as defendants: *Kendall v. Hamilton*, 4 App. Cas. 504 and other cases cited *ante* p. 174; but probably not where the other persons reside outside the division in which the original defendant resides: see section 110.

The defendant should raise any objection of this kind at the earliest possible moment: *Sheehan v. Great Eastern Ry. Co.*, 16 Ch. D. 59; or possibly he might object by his notice of defence, and it would then be necessary for the plaintiff to move to add the necessary parties: *Nobels Explosives Co. v. Jones*, 25 W.R. 653; *Lydall v. Martinson*, 5 Ch. D. 780. The Court may act in the matter without motion. The order cannot be made after final judgment: *Att.-Gen. v. Birmingham*, 15 Ch. D. 423. Where an order is not made before trial it might be made on terms on a motion for a new trial: *Adams v. Watson Manufacturing Co.*, 15 O.R. 218; 16 A.R. 2.

Cases in which Order may be Made.—If after action brought it is found that some person ought to have been included as plaintiff, as where a new partner has come into a firm before the contract or dealing in question, such person ought to be added as plaintiff: *Turquand v. Fearon*, 4 Q.B.D. 280. If an action be brought upon a document, *e.g.*, a covenant or guarantee, and it be discovered after action that in order to obtain relief from that document or to have it construed, it is necessary that some other person should be made plaintiff, the addition of such person would be allowed: *Ayseough v. Bullar*, 41 Ch. D. 341.

Where it appeared that two of the defendants had endorsed a note as sureties to the plaintiff for the makers, he was held to be entitled on payment of the note to the holder to recover against them although the note was made payable to his order, and an order of the judge substituting his name for that of the original holder of the note was upheld: *Pegg v. Howlett*, 28 O.R. 473; but see *Canadian Bank of Commerce v. Perram*, 31 O.R. 116; *Small v. Henderson*, 19 C.L.T. 267.

If an action be brought for debt and it is found that the debt has been assigned (or, if brought by an assignee, that it did not pass under an assignment), it would be proper to add either the creditor or the assignee, as the case might be, so as to determine the real question: *Woodward v. Shields*, 32 C.P. 282; *Walls v. Sault Ste. Marie Paper & Pulp Co.*, 18

C.L.T. 117; *Ostrom v. Sills*, 28 S.C.R. 485, 491. See *Prittie v. Connecticut Fire Ins. Co.*, 23 A. R. 449; *Dawson v. Graham*, 41 U.C.R. 552; *McGuin v. Fretts*, 13 O.R. 699; *Davis v. Reilley*, (1898) 1 Q.B. 1. In such a case, if the original plaintiff were willing and the party legally entitled were really the beneficial owner of the debt, he might be given the conduct of the case: *Emden v. Carte*, 17 Ch. D. 169.

See note *supra* p. 174 title, Misjoinder and Non-Joinder of parties: See also Rules 211, 216 and 224.

When plaintiff's claim had been assigned before action and only re-assigned at the time of the trial, it was held to be a proper case for amendment by adding the assignee as a party: *Walls v. Sault Ste. Marie Paper and Pulp Co.*, 18 C.L.T. 117.

In an action against agents for warranty of authority their principals are proper defendants: *Massey v. Heynes*, 21 Q.B.D. 330.

A creditor who had obtained a garnishee order against the plaintiff was added as a plaintiff: *Wallis v. Smith*, 46 L.T. 473; a person to whom defendant had assigned his interest *pendente lite* was added as a co-defendant: *Kino v. Kudkin*, 6 Ch. D. 160. In an action by shipowners against consignees of cargo, the shippers of the cargo were added as defendants in order that they might counterclaim against the plaintiffs for damages for short delivery: *Montgomery v. Foy*, (1895) 2 Q.B. 321.

Consent of Adult Plaintiff.—The consent does not require to be in writing as in the High Court. The judge, however, should be satisfied that he is a consenting party as the defendant must not be exposed to the risk that the adult plaintiff may come at some future time and ask to have the proceedings stayed, on the ground that he did not authorize them, so that the plaintiff may not get the costs from him: *per* Field, J., *Turquand v. Fearon*, 4 Q.B.D. 283.

For form of notice by defendant to third party see Form 308.

Application to Add or Strike Out a Party.—The application to add or strike out or substitute a plaintiff or defendant may be made to the judge at any time before trial, by motion or notice, or at the trial of the action in a summary manner: Rule 211.

Where too few Persons Have Been Made Plaintiffs.—Where it appears at a trial that a less number of persons have been made plaintiffs than by law require, the name of the omitted person may, at the instance of either party, be added, by order of the judge, on such terms as he shall think fit, and thereupon the action shall proceed, in all respects, as if the proper persons had been originally made parties; and if such persons shall, either at the trial or at some adjournment thereof, personally or by writing, signed by him or his solicitor, consent to become a plaintiff in manner aforesaid, the judge shall then pronounce judgment as if such person had originally been made a plaintiff, but if such person shall not consent to become a plaintiff in manner aforesaid, either at the trial or at the adjournment thereof, the action or matter shall be struck out: Rule 217. The cases provided for by this rule are also practically provided for by Rules 207 and 216.

This rule does not authorize a plaintiff who has no right to sue to amend by adding as a co-plaintiff the person who really possesses the right: *Walcott v. Lyons*, 29 Ch. D. 584; *Hathaway v. Doig*, 6 A.R. 264. A plaintiff cannot wait until the decision has gone against him and then apply to add a new plaintiff for the purpose of setting up a new and inconsistent case: *New Westminster Brewery Co. v. Hannah*, W.N. (1877) 35. Nor will a plaintiff be added merely to give the defendant the extra security for costs which it would afford: *De Hart v. Stevenson*, 1 Q.B.D. 313.

Party Wrongly Sued in a Representative Character.—When a party sues or is sued in a representative character but at the hearing it appears he ought to have sued or been sued in his own right the judge may, at the instance of either party and on such terms as he shall think fit amend the proceedings accordingly, and the case shall then proceed in all respects as to set-off, counterclaim and other matters, as if the proper description of the party had been given in the summons: Rule 214.

Amendment of Name and Description of Plaintiff.—Where the name or description of a plaintiff in the summons is insufficient or incorrect, it may be amended at the instance of either party by order of the judge, on such terms as he shall think fit, and thereupon the action shall proceed in all respects as if the name or description had been originally such as it appears after the amendment has been made: Rule 218. See notes *supra* and rules 100, 214, 215.

Adding or Substituting a Party as Defendant.—Where it is found that a wrong party as defendant, primary debtor or garnishee has been sued or served with a summons and it is desired to add a party under section 112 the judge may grant an order therefor after action commenced *ex parte*, provided those persons who have already been made parties have not been served with the summons. If the application be made after service of the summons the order adding other parties must only be granted upon notice to those parties who have already been served with the summons: Rule 208.

Where Party Appears at the Trial and Admits Liability.—When a person, other than the defendant, appears at the hearing and admits that he is the person whom the plaintiff intended to charge, his name may be substituted for that of the defendant if the plaintiff consents, and thereupon the cause shall proceed as if such person had been originally named in the summons: and if necessary the hearing may be adjourned on such terms as the judge may think fit; and the costs of the person originally named as defendant shall be in the discretion of the judge: Rule 213; see *Henney v. Scott*, 8 P.R. 251.

Where Defendant Improperly Described in Summons.—Where the name or description of the defendant in the summons is insufficient or incorrect, it may be amended, at the instance of either party, by order of the judge on such terms as he shall think fit, and thereupon the action shall proceed in all respects as if the name or description had been originally such as it appears after the amendment has been made; but if no objection is taken to the name or description, the action may proceed, and in the judgment and all subsequent proceedings founded thereon, the defendant may be named and described in the same manner: Rule 219.

Striking Out a Defendant.—Where several persons are made defendants and all of them have not been served, the name or names of the defendant or defendants who have not been served may, at the instance of either party, be struck out by order of the judge on such terms as he shall think fit; and the cause shall then proceed against the party served as to set-off, counterclaim and other matters as if all the defendants had been served: Rule 210. See also Rule 116.

No provision is made for judgment before all the defendants are served unless the defendant abandons against those not served: see Rule 116.

Where Defendant Improperly Added.—In any case wherein it appears to the judge that a party, defendant, has been improperly added merely for the purpose of giving the court jurisdiction, or colorable jurisdiction, over a cause of action, to the prejudice or inconvenience of another defendant, or otherwise, the judge may, in his discretion, strike out the name of such party and disallow all costs that may have been incurred by

making him a defendant, and allow to him such costs as he has been put to by reason of having been made such defendant; and thereby leave the remaining parties to their rights, whatever they may be, as to jurisdiction or otherwise: Rule 212. The addition of a party as defendant to justify an order under this rule must be improper. If the plaintiff has a cause of action against the party so added, and the court has jurisdiction to deal with the cause of action, and the other parties are properly defendants in the action, the judge would have no power to strike out the name of such party. The principle of this rule was enunciated by Chief Justice Hagarty in *Re Holland v. Wallace*, 8 P.R. 186, where it was held that a plaintiff proceeding against a primary debtor and a garnishee in a court which would not have jurisdiction against the primary debtor alone, must prove a garnishable debt in the hands of the garnishee, otherwise there would be no jurisdiction.

Husband and Wife.—In actions by or against a husband, if a wife or a husband be improperly joined or omitted, or if one of them be improperly substituted for the other, the summons may be amended at the instance of either party, by order of the judge, on such terms as he thinks fit: Rule 220.

Where Party Sues or is Sued in Representative Character.—Where a party sues or is sued in a representative character, but at the hearing it appears that he ought to have sued or been sued in his own right, the judge may, at the instance of either party, and on such terms as he shall think fit, amend the proceedings accordingly: Rule 214. Where a party sues or is sued in his own right, but at the hearing it appears that he ought to have sued or been sued in a representative character, the judge may, at the instance of either party and on such terms as he shall think fit, amend the proceedings accordingly: Rule 215.

In an action by or against an executor, administrator, a trustee, or an assignee in insolvency, his capacity as such must be stated in the particulars of claim: Rule 100 (a).

A statement of the representative capacity in which a plaintiff sues cannot be supplied in plaintiff's affidavit on a motion: *Hynes v. Fisher*, 4 O.R. 78.

Trustees, executors or administrators may sue and be sued on behalf of or as representing the property or estate which they represent without joining the persons beneficially interested therein; but the judge may, at any stage of the proceedings, order any such persons to be made parties in addition to or in lieu of the previously existing parties thereto: Rule 100 (b). See C.R. 193; *Holmsted & Langton*, p. 317.

Claims by or against an executor or administrator, as such, may be joined with claims by or against him personally if such claims arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator: Rule 100 (c). Where the testator was indebted to the plaintiff and after his death the executor has become indebted to the same creditor, the two claims should be joined in the same action: *Johnson v. Burgess*, 47 L. J. Ch. 552. The grounds of the claim should be separately stated in the particulars, and the relief claimed in respect of each should be stated separately. When a plaintiff is suing in his personal capacity the defendant cannot counterclaim against him for a debt due by him as executor: *Macdonald v. Carrington*, 4 C.P.D. 28.

Executors and administrators instituting actions are subject to the same rules as to costs as they would be if they were suing in their own right: *Daniels Ch. Pr.* 6th ed. 1175. In such actions if the plaintiff fail the costs shall, unless the judge shall otherwise order, be awarded in favor of the defendant and be levied of such goods as the judge shall

direct: Rule 100. In most cases it will be proper to order that the costs should be levied of the goods of the deceased, if any, and, if not, of the goods of the plaintiff.

An executor or administrator of one of several defendants could be added as a defendant: *Ashley v. Taylor*, 10 Ch. D. 768.

Application for Order to Amend.—If an application to add a party as defendant, primary debtor or garnishee, is made before service of the summons it may be made *ex parte*; if after service it may only be granted on notice to the parties who have already been served: Rule 208. The application may be made at any time before the trial by motion or notice, or at the trial in a summary manner: Rule 211. See *Pegg v. Howlett*, 28 O.R. 473. If the amendment is directed or allowed at the trial, no order is necessary. The amendment may be at once made or a minute of it may be entered in the procedure book: Rule 209. See also Rule 249. It could not be made *ex parte*: *Tidlesly v. Harper*, 3 Ch. D. 413.

The application could only be made by a plaintiff: *Clowes v. Hilliard*, 4 Ch. D. 413.

Procedure.—The summons should first be properly amended if the application is made before the trial and such application allowed. In such case the summons must be served on the added defendant, and he would have the same rights of defence and time therefore that he would have had if the action had been commenced on the day of the judge's order was made. Service of the summons on the added defendant may be dispensed with when the order is made at the trial, provided the defendant or his solicitor consent thereto. The costs of the amendment and postponement of the trial are left in the discretion of the judge. If the action as against the added defendant would be barred at the time of amendment by the Statute of Limitations he may rely on that defence.

Where a plaintiff or defendant is substituted, or added, or there is a change of parties under these rules, the procedure book must show the same by proper entries thereof, and if necessary the cause thereafter may be entered in a new place in the procedure book, retaining the original year number of the cause, and all subsequent proceedings are to be carried on under the altered title with the same year number: Rule 231.

Altered Title.—After the entries in the procedure book are made, the altered title only will be used, and may be as follows:

Between A.B., executor of X.Y., the original plaintiff,
deceased, Plaintiff,
and C.D., Defendant;

Or, Between A.B., Plaintiff,
and C.D., executor of X.Y., deceased, Defendant.

Marriage, Death or Insolvency of Parties.—An action or matter shall not become abated by reason of the marriage, death or insolvency of any of the parties if the cause of action survive or continue, and shall not become defective by the assignment, creation or devolution of any estate or title *pendente lite*, and whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict of finding of the issues of fact and the judgment, but may in such case be entered notwithstanding the death: Rule 223.

An action for injury to the person now survives to the executor of the plaintiff: *Mason v. Peterborough*, 20 A.R. 683; and it may now be said that all causes of action survive and continue notwithstanding death, except in cases of libel and slander: R.S.O. c. 129, sections 10 and 11. In other words, all actions cognizable in the Division Courts survive.

An action for the publishing of a false and malicious statement causing damage to the plaintiff's personal estate would survive: *Hatchard v. Mege*, 18 Q.B.D. 771. Such an action is not one of libel or slander: *Katecliffe v. Evans*, (1892) 2 Q.B. 527; *Dickerson v. Kadeliffe*, 17 P.R. 418.

If a defendant dies an action may be continued against his representatives under Rule 225.

When Party Entitled Fails to Appear.—When the plaintiff or defendant in an action or matter dies, and the cause of action survives, but the person entitled to proceed fails to appear on the return day, the trial may be adjourned or judgment may be entered for the defendant, or (as the case may be) for the person against whom the action or matter might have been continued; and in such case if the plaintiff has died execution may issue, as provided by Rule 140: Rule 230.

If a plaintiff dies, it seems to be necessary that his personal representative should appear upon the return of the summons. If he has not obtained probate or letters of administration, the trial may be adjourned. If he does not appear, judgment may be given against him; but no execution can be issued thereon unless proceedings in the nature of a *scire facias* are taken, as provided by Rule 140. If the defendant has died, it would be necessary for the plaintiff to revive the proceedings as described by Rule 225 before he could take judgment against his representatives, and Rules 89 to 99 would then be applicable.

Change of Parties Before Judgment.—Where by reason of an event occurring after the commencement of an action there shall be any assignment, creation, change, transmission or devolution of the interest, estate or title of any plaintiff, or of the liability, interest, estate or title of any defendant in any action before judgment, the plaintiff or the defendant, or the person to or upon whom such interest, liability, estate or title has come or devolved, may give notice thereof to the clerk, with his name and address, together with an affidavit of the truth of the fact stated in such notice; and thereupon such clerk shall cause a copy of such notice to be given to the plaintiff or defendant (form 310) in the action or matter in which shall be embodied a notice that unless upon a day to be named therein he appears and shows cause against the same, the person to or upon whom such interest, estate or title has come or devolved will be substituted for or made a joint plaintiff (or defendant) with the plaintiff (or defendant) named in the original summons: Rules 224, 225.

A personal representative may, under rule 224, take the benefit of section 10, R.S.O. c. 129, which provides that the executors or administrators of any deceased person may maintain an action for all torts or injuries to the person or to the real or personal estate of the deceased, except in cases of libel and slander; and in the case of an action for personal injuries brought by the deceased such representative is not bound to commence a new action: *Mason v. The Town of Peterborough*, 20 A.R. 683.

The affidavit to accompany the notice must set forth the fact of the death and the appointment of the personal representatives. The clerk is required to send a copy of the notice to the plaintiff (or defendant) by registered letter or to deliver the same to him: see rules 169 and 241. The length of time to be fixed by the notice is not prescribed. It is submitted that not less than two clear days' notice should be given.

For form of order see form 217.

Change of Parties—New Capacity.—Where by reason of any event occurring after the commencement of any action or matter and causing a change or transmission of interest or liability or by reason of any

person interested coming into existence after the commencement of the action or matter, it becomes necessary or desirable that any person, not already a party should be made a party, or that any person already a party should be made a party in another capacity, an order that the proceedings shall be carried on between the continuing parties and such new party may be obtained, before or at the trial, on application to the judge, upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence: Rule 226.

An order under this rule must, unless otherwise directed, be served on the continuing parties, or their solicitors, and also on such new parties unless the person applying be the only one, and unless discharged or varied, will be binding on such parties.

An order obtained as in the last preceding rule mentioned shall, unless the judge shall otherwise direct, be served upon the continuing parties, or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to the next two following rules, be binding on the persons served therewith, and every person served therewith, who is not already a party to the action or matter, shall be bound to appear at the trial, and in the same manner as if he had been served with a summons: Rule 227.

Where any person being under no disability, or under no disability other than coverture, or being under any disability other than coverture, but having a guardian *ad litem* in the action or matter, shall be served with such order as mentioned in Rule 226, such person may, at or before the trial, apply to the judge to discharge or vary such order: Rule 228.

An application to vary or discharge the order may be made by notice or summons: see Rule 249. Service may be made upon the continuing parties in the manner prescribed by Rule 241.

Where any person being under any disability other than coverture, and not having a guardian *ad litem* in the action or matter, is served with any order as mentioned in rule 226, such person may, before or at the trial, apply to the judge to discharge or vary such order: Rule 229.

The above rules are taken from the English County Court Rules and are more particularly applicable to classes of actions which are not within the jurisdiction of the Division Courts, but to which the jurisdiction of the English County Courts extend, *e.g.*, actions to recover possession of small tenements; actions for recovery of land where the annual value does not exceed £50 per annum; actions properly or improperly commenced in the High Court and transferred to the County Court; actions for administration, execution of trusts, foreclosure and redemption; specific performance; partnership; partition; actions under The Settled Lands Act; proceedings for maintenance of infants, and proceedings under The Trustees' Relief Acts.

Notice to an Added or Substituted Defendant.—When a defendant is added or substituted, except when a defendant is substituted under Rule 213, an order shall be drawn up, and together with a copy of the summons and particulars of claim, and a notice setting forth the day and place upon and at which he is to attend at the court, shall be served upon him according to the practice in the case of service of an ordinary summons: Rule 221. The service of the order and summons could not be dispensed with, unless the order should be made at the trial and the party to be served or his solicitor consented thereto: Sub-section 3.

Where a Person Brought In Does Not Appear.—If a person not originally a party to the action, who has been served with the order as in Rule 221, does not appear at the trial, the judge may proceed with the trial and give such judgment or make such order as may be just against the person not appearing, or he may adjourn the trial and give such directions and make such order as to costs as he shall think fit: Rule 222.

General Provisions as to Amendment.—The power of amendment now given is most extensive: see Rules 3 and 4. No proceeding shall be defeated by any formal objection: Rule 236; section 217.

Non-compliance with the rules is not to render any proceeding or matter void unless the judge directs, but such proceeding may be set aside either wholly or in part as irregular, or amended or otherwise dealt with in such manner and upon such terms as the court or judge thinks fit: Rule 237. When a notice of motion has been irregularly given but the opposite party has not been injured by the irregularity, it may be disregarded and the motion heard: *Davison v. Breson*, 22 Ch. D. 504.

"I have no doubt the meaning of the Rule is that the court or judge may, after an irregular proceeding has been taken, either set it aside for irregularity, or amend it, or otherwise deal with it as the court shall think fit: but it is not to be treated as void:" *per Kay, J.*, *Petty v. Daniel*, 34 Ch. D. 180.

A judgment irregularly signed is not a mere non-compliance with the rules, which may be remedied under this rule: *Anlaby v. Prætorius*, 20 Q.B.D. 764.

The judge may at any time and on such terms as to costs and otherwise as to him may seem just, amend any defect or error in any proceedings; and all such amendments may be made as may be necessary for the advancement of justice, determining the real question raised by or depending on the proceedings and best calculated to secure the giving of judgment according to the very right and justice of the case: Rule 239. As to amendment of claim see notes to section 98, *ante* p. 155.

PARTNERS.

Proceedings By or Against Co-partners.—The provisions of the Act allowing proceedings by or against firms enable the firm name to be used only when they sue or are sued. It is improper, therefore, to use a firm name when co-partners are proceeded against as garnishees: *Walker v. Rooke*, 6 Q.B.D. 631.

The provisions enabling the firm name to be used have caused much difficulty both in England and in this province. In *Wilson v. Roger, Melay & Co.*, 10 P.R. 357, *Osler, J.A.*, said: "With the system of registration of co-partnerships which prevails with us I must say that I fail to see the usefulness or convenience, in our practice, of these rules which relate to suing co-partners in the firm name. The occasions must be rare in which a plaintiff can have any difficulty in suing the individual members of the firm."

The provisions are, primarily, taken from the Scottish law: see *Bullock v. Caird*, L.R. 10 Q.B. 276.

Where a firm's name is used, it is only a convenient method for denoting these persons who compose the firm at the time when that name is used, and a plaintiff who sues partners in the name of their firm, in truth, sues them individually just as much as if he had set out all their names: *per Lindley, L.J.*, *Western National Bank v. Perez*, (1891) Q.B. 314; *Re Sinclair v. Bell*, 28 O.R. 483; but unless he sues them all as partners, he is not entitled to judgment against them individually: sub-sec. 5; *Standard Bank v. Frind*, 14 P.R. 355. To take advantage of the provisions, it is necessary that the co-partners should be sued in their firm names. To sue "A.B. and C.D. trading as B. & D." would entitle the plaintiff to judgment against A.B. and C.D., but not against the firm as such; and if there should be an undisclosed partner, he would be discharged: *Munster v. Cox*, 10 App. Cas. 680. Where the firm is sued, judgment must be against the firm: *Jackson v. Litchfield*, 8 Q.B.D. 474; *Adam v. Townsend*, 14 Q.B.D. 103; and no

judgment by default can be signed against the firm until the full time has elapsed for each partner served to put in a defence: *Alden v. Beckley*, 25 Q.B.D. 543. If one partner files a disputing notice, disputing his liability, judgment cannot be given against the firm till after trial, though the other partners may have been served and are in default: *Id.* Where the firm has been dissolved, the firm name may, nevertheless, be used: *Wilson v. Roger, McLay & Co.*, 10 P.R. 355, and if one partner has retired, and the same firm name is still used, it is a question of fact who was intended to be sued: *Davis v. Morris*, 10 Q.B.D. 436; see *Ex parte Young, Re Young*, 19 Ch. D. 124.

The English rules have been held to be inapplicable to foreign firms: *Russell v. Cambefort*, 23 Q.B.D. 526; *Western National Bank v. Perez*, (1891) 1 Q.B. 304; *Indigo Co. v. Ogilvy*, (1891) 2 Ch. 31; *Dobson v. Festi*, (1891) 2 Q.B. 92; and even where one partner is resident in the jurisdiction, the service upon him is not good service on the firm; *Heinemann v. Hale*, (1891) 2 Q.B. 83; nor, *per Fry, L.J.*, even upon the partner served: see p. 92. In the Division Court, by virtue of section 105, if the chief place of business of the firm is out of the province, but there is an agent with a place of business "as such" within it, the firm may be sued and service is good if made on such agent. Other foreign firms could not, however, be reached, and if one member of a foreign firm be resident, anomalous as it may seem, it is submitted that his firm could not be proceeded against under this section. It will be noticed that a partner must be served. Service upon a manager would be useless: see *Ex parte Ide, Re Ide*, 17 Q.B.D. 755.

Judgment against a firm does not authorize execution against a partner not served, unless he has admitted in the notice of dispute or defence that he is "a partner or unless he has been adjudged a partner." An adjudication may be obtained by adding such partner as a defendant at the trial, and serving him with the amended summons: see sub-section 6. Such adjudication cannot be obtained summarily; *Standard Bank v. Frind*, 14 P.R. 355; see *Tennant v. Manhard*, 12 P.R. 619, which must be treated as overruled. It is submitted that if judgment is obtained by default against the firm, a summons might be issued by the clerk calling upon any partner, against whom execution is desired, to appear at any sittings of the court upon an application that he be adjudged a partner. A judgment summons should not be issued to a partner against whom execution cannot issue: *Re Young*, 19 Ch. D. 124; *Reid v. Graham Bros.*, 25 O.R. 573. In England, however, the County Court Rules of 1892; Order xxv. Rule 6, now provide for the issue of such summons upon an affidavit that such party is a member of the firm.

No person can be adjudged a partner, under this section, unless he be in truth such. Mere holding out will not be sufficient: *Re Young v. Parker*, 12 P.R. 646; *Standard Bank v. Frind*, 15 P.R. 438. But where promissory notes are signed by a firm as makers, a person who holds himself out to the payee as a member of the firm, though he may not be so in fact, is liable as a maker; *Ray v. Isbister*, 26 S.C.R. 79; see also *Wigle v. Williams*, 24 S.C.R. 713. Judgment against the firm destroys all liability of a person who would otherwise be liable as a nominal partner: *Scarf v. Jardine*, 7 App. Cas. 345; *Ray v. Isbister*, 22 A.R. 12; 26 S.C.R. 79; see *Van Wart v. Critchley*, 17 C.L.T. 316. A judgment creditor is not bound to use against the members of the firm, the special remedies given by this section. He may sue them upon the judgment: *Clark v. Cullen*, 9 Q.B.D. 355; see *Ray v. Isbister, supra*.

The provisions of sub-section 4 of this section apply to an action against a firm which has been dissolved; *Wilson v. Roger McLay & Co.*, 10 P.R. 355, *Re Sinclair v. Bell*, 28 O.R. 483. Where an action was brought against a firm consisting of two partners one of whom was resident out of Ontario, and the other where the cause of action arose, and in a county other

than that in which the action was brought, although such division was nearest to that in which the firm had carried on business, it was conceded that the judge at the trial might have made an order permitting the plaintiff to proceed: *Re Sinclair v. Bell*, 28 O.R. 483.

Upon the death of a partner the only liability existing at law is that of the surviving partner the estate of the deceased partner being only available through the equities existing in favor of the surviving partner and when the administratrix of the estate of deceased partner was made a defendant her name was struck out leaving the creditors to pursue their remedy against the estate in a proceeding pending for its administration, concurrently with the action against the surviving partner: *Campbell v. Farley* 18 P.R. 97; but see R.S.O. c. 129 s. 15; 19 C.L.T. 122.

Where a partner dies before action, and the action is brought against the firm alone in the firm name, the deceased partner is not a party to the action at all so far as his private estate is concerned. If in such an action a partner dies between service of the writ and judgment the estate of the deceased partner is not bound. Unless his personal representative is a defendant, judgment is against the surviving partners and can only be enforced against them and the partnership assets: *Ellis v. Waldeson*, (1899) 1 Q.B. 714. The personal representative of the deceased partner must, therefore, be added as a defendant in order to bind the deceased partner's private estate: *Ib.*; *Phillips v. Homfray* 24 Ch. D. 439; *Re Shepherd, Atkins v. Shepherd*, 43 Ch. D. 131.

No power is given to sue in the firm name to a person who carries on business under such a name: *Mason v. Mogridge*, 8 T.L.R. 805; *British Columbia Furniture Co. v. Tugwell*, 20 C.L.T. 144; but the words "& Co." added to his own name in the style of cause are mere surplusage and an amendment should in such a case be allowed at the trial as a matter of course: *Lang v. Thompson*, 16 P.R. 516. Nor can a person who carries on business under a partnership style be sued under that style, there being no provision similar to C.R. 231.

But a number of persons, unincorporated, doing business in a corporate name, may be sued under this section: *Escott v. Gray*, 39 L.T. 121.

Judgment by Default where Summons Specially Endorsed.

113. In actions brought in a Division Court for the recovery of any debt or money demand, where the particulars of the plaintiff's claim, with reasonable certainty and detail, are endorsed on or attached to the summons, and a copy of the summons and particulars, with a notice in the form prescribed by the General Rules or Orders relating to Division Courts from time to time in force, annexed to or endorsed on such copy has been duly served, then, unless the defendant has left with the Clerk, within eight days after the day of service (where the service is required to be ten days before the return), or within twelve days after the day of service (where the service is required to be fifteen days before the return), a notice to the effect that he disputes the claim, or some part, and how much thereof, final judgment may be entered by the Clerk on the return of such summons, or at

In proceedings by special summons final judgment entered by the clerk when claim in whole or in part not disputed, etc.

any time within one month thereafter for the amount claimed in such particulars or so much thereof as has not been disputed, and execution may issue thereon at the instance of the plaintiff without prejudice to his right to recover for the remainder of his claim. R.S.O. 1887, c. 51, s. 109 (1); 56 V. c. 15, s. 3.

Debt or Money Demand.—A "debt" has been defined to be: "whatever one owes:" *Rodman v. Munson*, 13 Barb. 197; also: "That for which an action of debt will lie—a sum of money due by certain and express agreement. In a less technical sense, any claim for money; in a more enlarged sense, any kind of a just demand:" *New Haven Saw Mill Co. v. Fowler*, 28 Con. 108; and a "demand" has been defined as: "Any account upon which money or other thing is, or is claimed to be, due:" *per* Dixon, C.J., in *Stringham v. Supervisors*, 24 Wis. 600. The words used here, "any debt or money demand," have not, so far as the writer is aware, been defined in any reported case. But the following may, in the absence of a better, be an appropriate definition. Any claim, legal or equitable, on contract express or implied, on which a certain sum of money, not being unliquidated damages, is due and payable.

An action for a debt not due would not come within these provisions. Nor an action on a bond with a penalty for doing anything but payment of money: *Griswold v. B.B. & G. Ry. Co.*, 3 U.C.L.J. 115. Nor a claim for unliquidated damages: *Jones v. Thompson*, 1 E.B. & E. 63; *Dresser v. Johns*, 6 C.B.N.S. 429; *Bank of Toronto v. Burton*, 4 P.R. 56; *Boyd v. Haynes*, 5 P.R. 15; *Knight v. Abbott*, 10 Q.B.D. 11; nor a claim for partly liquidated and partly unliquidated damages: *Rogers v. Hunt*, 10 Ex. 474; *Westlake v. Abbott*, 4 U.C.L.J. 46; nor an action for not returning goods let to hire: *per* Tindal, C.J., 3 M. & G. 851; nor an action on a covenant in a lease for unascertained damages: *Gowanlock v. Mans*, 9 P.R. 270; nor money held by an executor on sale of property of his testator: *Soules v. Soules*, 35 U.C.R. 334; nor an action for breach of covenant for title: *Kavanagh v. Corp. of Kingston*, 39 U.C.R. 415; nor an action for arrears of alimony during the pendency of the suit: *Bailey v. Bailey*, 13 Q.B.D. 855; nor for the balance of purchase money under an agreement to purchase, where defendant refuses to complete the purchase: *Lender v. Tod-Heatley*, W.N. (1891) 38; nor for any fluctuating sum, such as the amount of rents received by a receiver to be applied by him in payment of interest and arrears: *Poulett v. Hill*, (1893) 1 Ch. 277, but see *Lynde v. Waithman*, (1895) 2 Q.B. 180, at p. 187.

The following causes of action, it is submitted, would come within the provisions of the section: any sum of money certain payable under any covenant, money bond, or promissory note; any cause of action which, in the higher courts, would formerly have been declared for as money payable for goods sold and delivered; goods bargained and sold; work done; money lent; money paid; money had and received; interest upon money; accounts stated; lands sold and conveyed; use and occupation; rent; money payable on bills of exchange and promissory notes; on an award; the price of shares or stocks sold; freight; hire of goods; on a guarantee for the payment of a sum certain; carriage of goods; board and lodging; agistment of cattle or horses, etc.; premiums of insurance or assessments made by Mutual Ins. Co.'s; medical or other attendance; on a penal statute when jurisdiction not excluded: *Brash qui tam v. Taggart*, 16 C.P. 415; on an interim insurance receipt: *Kelly v. The Isolated Risk & F. F. Ins. Co.*, 26 C.P. 299; in cases where damages liquidated; good-will of premises; a judgment in the Division Court; and that the latter case is not open to the objection raised in *McPherson*

v. Forrester, 11 U.C.R. 362, and Donnelly v. Stewart, 25 U.C.R. 398, and could be sued under this section: Hodson v. Baxter, E.B. & E. 884; Dick v. Tolhausen, 4 H. & N. 695; see section 210.

A claim for an account stated with interest would be within the section: Smart v. N. & D. R. Ry. Co., 12 C.P. 404; see Northern Railway Co. v. Lister, 4 P.R. 120. If interest is claimed the particulars should either state the amount or the date from which it is claimed: Bardell v. Miller, 7 C.B. 753. The rate of interest need not be stated unless above six per cent.; see Allen v. Bussey, 4 D. & L. 430. Interest should only be claimed when recoverable by contract either express or implied: Inglis v. Wellington Hotel Co., 29 C.P. 387; McKenzie v. Harris, 10 U.C.L.J. 213; or upon a contract in writing where the money is payable at a time certain or where there has been a demand for payment with notice that interest would be claimed: London, Chatham & Dover Ry. Co. v. South Eastern Ry. Co., (1892) 1 Ch. 120; R.S.O. c. 51, section 114. A claim of interest in the summons or particulars would be an insufficient demand: Rhymney Ry. Co. v. Rhymney Iron Co., 25 Q.B.D. 146.

It was doubted in Green v. The Hamilton Prov. and Loan Society, 31 C.P. 574, whether surplus money in the hands of a mortgagee after sale of land was a purely money demand, but it has been since held that such money was in the nature of an equitable cause of action for money had and received: Legarie v. The Canada L. & B. Co., 11 P.R. 512. See also Reddick v. Traders Bank, 22 O.R. 449. A claim by a partner against the other members of the firm for his share of a sum of money received by the other partners, is a purely money demand, though it may be necessary to take the whole partnership account: Allen v. Fairfax Cheese Co., 21 O.R. 598.

But for 61 Vic. c. 15, s. 9, a judgment of another provincial court would be suable under the words used here: Henderson v. Henderson, 6 Q.B. 288; or a judgment of any court of record: Hutchinson v. Gillespie, 11 Ex. 798; or the judgment of a foreign court: Grant v. Easton, 13 Q.B.D. 302. See *ante* p. 4.

Reasonable Certainty and Detail.—This contemplates that each item of the claim should be given, with the dates, so far as reasonably can be done. Such particulars should be given as to disclose clearly to the defendant exactly for what he is being sued, and so that, if any future action were brought, he would be able to show that the matter in question had already been adjudicated upon: Lucas v. Ross, 9 P.R. 251. The first process in actions for the recovery of a debt or money demand under this section must be a special summons: Rule 11; and a copy of the particulars must be annexed thereto: Rule 150. For requisites of summons and particulars see notes to sections 98 and 99. For forms of particulars see forms 14 to 18.

Duly Served.—See notes to sections 100 and 103; Rules 16, 17, 18, 19 and 190. As to service on defendant out of the jurisdiction, see section 87. As to service on a foreign corporation having an agent within the jurisdiction, see section 105; Rule 21. As to service on partners, see section 112, sub-section 4, and notes thereto.

Within Eight Days.—The day of service is not to be reckoned: see notes to section 90, *ante* p. 144. The judge has no power to extend the time: notes to section 90, *ante* p. 143. But he could allow a defendant in to defend under section 114 (2) or section 117: see notes to those sections.

The Return of such Summons.—That is, when the time required to elapse under sections 100 and 101 has expired, namely, ten days when the defendant resides within the county, fifteen days when he resides out of the county or when the defendant resides out of the jurisdiction under section 87: see also rules 17, 18 and 19.

Notice Disputing Claim.—The notice must be in writing: section 100; Rule 240. On filing the notice no fee is payable by the defendant. For forms of notices of defence see Form 19. A notice of set-off or other statutory defence, or of paying money into court, or pleading tender or counterclaim, is sufficient notice of defence: Rule 104. Notice must be given by the clerk to the plaintiff of every such defence: Rules 162 and 168; by registered letter or personally: Rule 169.

In case an executor or administrator pleads his notice to creditors and distribution of assets, he must give notice of such defence, and that there has been a proper audit of the accounts of his administration: Rule 99 (a).

Notice of Admission of Part.—The defendant or plaintiff may give the opposite party notice (form 19) in writing that he will admit, on the trial of the cause, any part of the claim, counterclaim or set-off, or any facts which would otherwise require proof; and after such notice is given, the plaintiff or defendant shall not be allowed any expense subsequently incurred for the purpose of such proof. The notice must be served on the plaintiff or defendant or left at his usual place of abode, or, if he be not resident in the division, be left with the clerk for him at least five days before the day appointed for the trial or hearing: Rule 103.

Or Some Part and How Much Thereof.—See Rules, 101-103. If the notice disputes only a part or admits a part of the claim the clerk must forthwith notify the plaintiff, as provided by Rule 162, and require him to forthwith state in writing whether he is willing to take judgment for the portion admitted or undisputed, and if the plaintiff fails to notify the clerk within forty-eight hours after the receipt of such notice, that he is content to take judgment for such part, it will be assumed that he intends to proceed for the remainder of the claim, and the case will be entered for trial: Rule 101 (a); Form 195. If the plaintiff signifies his intention to proceed for the remainder of the claim, the clerk must notify the defendant by post or by sending notice to his usual place of abode or business: the notice must state when and where the case is to be tried: Rule 166; Form 201. It will be noticed that if the plaintiff does not notify the clerk of his intention to proceed, although the case is to be set down for trial, no notice to the defendant will be required. No provision is made in case the clerk fails to comply with the rule. But if the defendant were damaged by reason of the clerk's neglect to notify him he would probably have a right of action against the latter. See Rule 80(a) and rule 252.

The notice to the plaintiff must be registered if sent by mail: Rule 169.

Within one Month.—That is one calendar month: Interpretation Act, s. 8 (15). See notes to section 41. If the judgment be not entered within the time specified it cannot be entered afterward, without an order from the judge: Rule 123. It would seem, however, that judgment might also be entered under section 115.

Judgment for Such Part.—The judgment will be for the full amount claimed if the claim is not disputed. If a part of the claim only is disputed judgment may be entered for such part and execution may issue thereon at the instance of the plaintiff, without prejudice to his right to recover for the remainder of his claim. Formerly final judgment for part would have been a bar to the recovery of the remainder: *Winger v. Sibbald*, 2 A.R. 610. But under the provisions of the section as well as under Rule 101, the plaintiff may "proceed to judgment and execution for such portion without prejudice to his right to recover for the remainder."

See Rule 129 as to judgment for part on motion for leave to defend under section 118.

Judgment Where there are Several Defendants.—In case there are several defendants, and all of them have not been served with a special summons, judgment cannot be entered by default unless the plaintiff is content to take judgment against those served only: Rule 116. If notice disputing the claim is given by one or more of several defendants and others have not given such notice, judgment may be entered and execution issued against the latter, without prejudice to the plaintiff's right to proceed against the other defendants who have not been served: Rule 120; *Dueber Watch Case Co. v. Taggart*, 26 A.R. 295.

Minuting Defendants.—Where all of the defendants have not been served with a special summons on the same day, and no notice of defence has been entered by any defendant or defendants served, a minute may be entered in the procedure book, immediately after the expiration of the time for entering defence by each defendant served, stating the facts of service and no defence. And if no defence has been entered by any of the defendants, final judgment may be entered against the mall immediately after the expiration of the time in which the last defendant served might have entered such defence: Rule 119. Any defendant minuted under this rule may be let in to defend by the judge on sufficient grounds shown: Rule 121. See notes to section 114 (2).

Where Some Defendants Have Confessed.—Where some of several defendants have been served and not disputed the claim while another or others of them who have not been served have given a confession of the debt, the clerk must transmit the confession duly proved to the judge for his order, and when the order has been made, the clerk may enter judgment within one month after the return of the summons against all of the defendants for the amount claimed if those who have confessed have acknowledged the same amount in their confession. The plaintiff cannot elect to proceed on the confession against some of the defendants, or to take final judgment against those who have not confessed. The judgment must be against all of them jointly: Rule 118; Form 81. There can be only one judgment against all of the defendants: see *Rice v. Kinghorn*, 17 P.R. 1.

Where the defendant has given a confession and has not disputed the claim, the plaintiff may elect to proceed on the confession as in ordinary cases, or he may take final judgment under this section: Rule 122. The plaintiff will avoid any question of the judgment being a preference and void under R.S.O. c. 147, by taking judgment under the section.

The judge is now authorized to give judgment upon a confession otherwise than at a sitting of the court: Rule 102; see notes to section 211.

Execution.—Execution may issue forthwith on a judgment under this section: Rules 125, 131.

Married Women.—Judgment may be entered against the separate estate of a married woman under this section, if a special summons properly endorsed has been served upon her, and if she does not dispute the claim or deny the allegation with respect to separate estate under Rule 271: Rule 272.

As to form of judgment, see Rule 273; *Holtby v. Hodgson*, 24 Q.B.D. 103; *Scott v. Morley*, 20 Q.B.D. 120.

Contracts Entered Into Since 13th April, 1897.—In actions on contracts entered into by a married woman on or after 13th April, 1897, it is not necessary to allege or prove separate estate at the time the contract was entered into or subsequently, but the judgment will be limited to the separate property which she may at the time or thereafter possess or be entitled to; and will also be enforceable by process of law against all

property which she may thereafter while discover, possess or be entitled to, except property which she is restrained from anticipating: R.S.O. c. 163, section 4.

Summons,
particulars
and
affidavit to
be filed.

114.—(1) The final judgment so entered may be in the form prescribed by the General Rules or Orders relating to Division Courts from time to time in force, but no such judgment shall be so entered until the summons and particulars with an affidavit of the due service of both have been filed.

Judge may
set aside
judgment.

(2) The Judge may set aside such judgment, and permit the case to be tried, on sufficient grounds shown, on such terms as to costs and otherwise as he thinks just. R.S.O. 1887, c. 51, s. 109 (2, 3).

Final Judgment so Entered.—See notes to section 113; Form 78. A judgment can be entered on a holiday: *Bennett v. Potter*, 2 C. & J. 622. In this country the only day on which no judicial act can be validly done is the Lord's Day or Sunday: *Foster v. Toronto Ry. Co.*, 31 O.R. 1, but see *Harrison v. Smith*, 9 B. & C. 243.

"Judgment" means the final decision of the court or judge in any action, or the entering of final judgment by the clerk under sections 113 and 114 of the Act: Rule 2 (18).

Affidavits of Due Service of Both.—See notes to sections 90 and 109, and Rules 262 to 269 for the requirements of affidavits generally. For this affidavit see form 28.

If judgment were signed on an insufficient affidavit, it might be set aside for irregularity: *Levy v. Wilson*, 9 C.L.J. 191; but see *Potter v. Pickle*, 2 P.R. 291. A judgment irregularly signed is not a mere non-compliance with the rules which may be remedied under Rule 237: *Anlaby v. Pretorius*, 20 Q.B.D. 764. The defendant is entitled to have such a judgment set aside *ex debito justitiæ* without any terms being imposed: *Id.*; *Bouchier v. Patton*, 3 U.C.L.J. 48. Where a summons has been served on a wrong person, and service is possible on the right person, the irregularity cannot be amended: *Nelson v. Pastorino*, 49 L.T. 564. And the clerk might possibly be liable as a trespasser: *Carey v. Lawless*, 13 U.C.R. 285; *Rossier v. Westbrook*, 24 C.P. 91; *Codrington v. Lloyd*, 8 A. & E. 449.

On Sufficient Grounds Shown.—See notes to sections 117 and 174.

Setting Aside the Judgment.—A defendant who has been minuted under Rule 119 may also be let in to defend "on sufficient grounds shown:" Rule 121; and less might be required to allow a defendant in to defend who has merely been minuted than to set aside a final judgment, but the defendant should show what facts he relies upon. Mere guesswork is insufficient: *Merchants' Nat. Bank v. Ontario Coal Co.*, 16 P.R. 87.

To set aside a judgment under this section, an affidavit merely stating that the defendant has a good defence on the merits would be insufficient: *Whiley v. Whiley*, 4 C.B.N.S. 653; *Anderton v. Johnston*, 8 U.C.L.J. 46; *McDonald v. Burton*, 2 C.L.J. 190; *Wooster Coal Co. v. Nelson*, 4 P.R. 343; see *Hopton v. Robertson*, W.N. (1884) 77; *Farden v. Richter*, 23 Q.B.D. 124; *Hammond v. Schofield*, (1891) 1 Q.B. 455; and probably as full an affidavit is necessary as would be required to defeat a motion under section 118 for immediate judgment: *Dobie v. Lemon*, 12 P.R. 64; *Bourne v. O'Donohue*, 17 P.R. 522; *Richardson v. Howell*, 8 T.L.R. 445; *Patterson v. McLean*, 21 O.R. 221.

An affidavit by plaintiff's solicitor, who did not profess to have personal knowledge, except as he was advised and believed, and who, while referring to the proposed defence, did not undertake to verify the particulars of it, was not sufficient: *Piper v. King's Dyspepsia Cure Co.*, 30 N.S.R. 429; and nothing short of an affidavit showing merits would entitle defendants to come in and defend, or justify the judge to whom the application was made in permitting them to do so: *Id.*; see also *Bigelow v. Doherty*, 30 N.S.R. 393; *Sands v. Fisher*, 30 N.S.R. 185.

If the evidence contained in the affidavit as to the merits is not satisfactory or convincing, the judgment will not be set aside: *O'Sullivan v. Murphy*, 78 L.T. 213; *Ritz v. Schmidt*, 12 Man. L.R. 138.

Defendant should also account for his not putting in a notice in time: *per Cotton, L.J.*, *Atwood v. Chichester*, 3 Q.B.D. 725; and especially if a trial has been lost: 4 U.C.L.J. 69.

But the judge will let the case go to a trial if the merits are in dispute, as shown by the affidavits: *Wilson v. Mun. Council of Port Hope*, 10 U.C.R. 405; *Wooster Coal Co. v. Nelson*, 4 P.R. 343; *Reynolds v. Gallihar Gold Mining Co.*, 8 C.L.T. 17.

It is suggested that a proper form of affidavit would be, in the case of the defendant making the affidavit thus: "I am advised and verily believe that I have a good defence to this action upon the merits;" and in the case of his solicitor or agent: "The defendant has, as I am informed (or instructed) and verily believe, a good defence to this action upon the merits;" and in both cases showing the facts or some fact, constituting such good defence. "He need not set out the whole defence with minute particularity:" *per Cockburn, C.J.*, 4 C.B.N.S. at p. 659.

The affidavit must apply the defence to the particular action, by stating that the defendant has a good defence "herein," or in "this cause," or "in this action," on the merits: *Tate v. Bodfield*, 3 Dowl. 218; *Lane v. Isaacs*, 3 Dowl. 652; *McGill v. McLean*, 1 Cham. R. 6.

It should be made by the defendant, his solicitor or agent, or some person who has been concerned in the cause, in such a way as to make him acquainted with the merits: *Rowbotham v. Dupree*, 5 Dowl. 557.

In setting aside a regular judgment the court considers the statute of limitations a meritorious defence: *Maddocks v. Holmes*, 1 B. & P. 228; *McIntyre v. Canada Co.*, 18 Gr. 367; *Seaton v. Fenwick*, 7 P.R. 146; *Dobie v. Lemon*, 12 P.R. 64. And also infancy: *DeLafield v. Tanner*, 1 Marsh. 391.

Nor would the court refuse to set aside a regular judgment though bankruptcy was going to be pleaded: *Evans v. Gill*, 1 B. & P. 52.

In an action on a solicitor's bill, the non-delivery of a signed bill, is not a defence on the merits: *Beck v. Mordant*, 2 Bing. N.C. 140, nor is a set-off: *Anderton v. Johnston*, 8 U.C.L.J. 46.

A judgment should not be set aside to allow a defendant to set up matters subsequent to it: *Schofield v. Bull*, 3 U.C.L.J. 204.

The truth of the merits shown by defendant's affidavit cannot be inquired into: *Blewitt v. Gordon*, 1 Dowl. N.S. 815; *Wooster Coal Co. v. Nelson*, 4 P.R. 343; *Southwick v. Hare*, 15 P.R. 222; but see 10 U.C.R. 405; but if contradicted by documents signed by defendant, he will be required to bring money into court: *Richardson v. Howell*, 8 T.L.R. 445. The court will not try the defence asserted but affidavits may be received for the purpose of enabling the court to determine how far the defence may be *bona fide*, and *a fortiori*, his application may be met by documents under his own hand, not explained, in answer showing that such defence is non-existent: *Bourne v. O'Donohue*, 17 P.R. 522.

Where the summons in an action against a firm was served upon the firm, and five days afterwards was served upon an alleged partner, and

judgment by default was signed against the firm; and subsequently to the signing of the judgment, but within eight days after the service of the writ upon him, an appearance was entered by the partner: Held, that he was entitled to have the judgment against the firm set aside: *Alden v. Beekley & Co.*, 25 Q.B.D. 543.

Judgment for Too Much.—Where a payment on account has been made between the issue of the summons and the entry of judgment a judgment entered for more than the amount actually due will be set aside: *Hughes v. Justin*, (1894) 1 Q.B. 667.

A judgment by consent against a company is as binding upon the parties as one obtained after a contest: *Re South American and Mexican Co.*, (1895) 1 Ch. 37; but if founded on a contract which it was *ultra vires* of the company to enter into, it will be void: *Great North West Central Ry. Co. v. Charlebois*, (1899) A.C. 114, reversing *Delap v. Charlebois*, 26 S.C.R. 221.

Judgment on Counterclaim When Plaintiff Does Not Appear.—If, when the trial is called on, the plaintiff does not appear, and defendant has given notice of a counterclaim, he may prove such counterclaim and have judgment accordingly: Rule 113.

The rule treats such judgment as one obtained by default under this section, which may be set aside without a formal application for a new trial: see notes to section 75, *ante* p. 112, title *Judgment on Counterclaim*.

Application to Set Aside Judgment.—Except where a special mode of making the application is provided for by the rules or by the Act, an application may be made to the judge at any sitting of the court. If both parties are present he may hear the evidence *visa voce* in support thereof, but if both parties should not be present, notice of the application must be given, together with the grounds thereof. At the option of the party making the application in court, the evidence in support thereof may be upon affidavit. No formal order need be drawn up if made at a sitting of the court, but the order shall be entered as in other cases of order made. If the order is made upon affidavit elsewhere than at a sitting of the court, the original order should be mailed to the clerk or delivered at his office: Rule 251.

The application may be made by any person whether a party or not who has or can acquire a *locus standi*: *Jacques v. Harrison*, 12 Q.B.D. 136, 165.

Terms as to Costs or Otherwise.—The plaintiff should be placed as nearly as possible in the same situation as though the action had proceeded in the usual way: *Smith v. Blundell*, 1 Chitty 226. The terms commonly imposed have been the payment of the costs: *Sisted v. Lee*, 1 Salk. 402; *Westlake v. Abbott*, 4 U.C.L.J. 46, pleading without delay; and sometimes bringing the money into court: see *Watt v. Barnett*, 3 Q.B.D. 183; *Wade v. Simeon*, 13 M. & W. 647; *Every v. Wheeler*, 3 U.C.L.J. 11; *McGregor v. Harris*, 9 C.L.T. 504; *Wright v. Mills*, 60 L.T. 887, but payment into court should not be ordered unless it would be justified on a motion under section 116: *Dobie v. Lemon*, 12 P.R. 64.

So long as a regular judgment remains it can be enforced: *Tait v. Harrison*, 17 Gr. 458. Where the plaintiff has obtained judgment irregularly the defendant is entitled *ex debito justitiæ* to have it set aside; and the court has only power to impose terms upon him as a condition of giving him costs: *per Fry and Lopes, L. JJ.*, *Anlaby v. Pretorius*, 20 Q.B.D. 764. But the court may award costs to the defendant on the ground that his motion had been unnecessarily opposed: *Imperial Oil Co. v. Deming*, 29 N.S.R. 98.

If defendant does not first comply with the terms of the order he cannot take advantage of it.

An order setting aside proceedings must be served forthwith, otherwise the opposite party may treat it as abandoned: *Molsons Bank v. Dillabaugh*, 13 P.R. 312.

Mere lapse of time is not necessarily a bar to an application to set aside a judgment by default, and when no irreparable wrong will be done a plaintiff, the judgment may be set aside unconditionally: *Atwood v. Chichester*, 3 Q.B.D. 722: see *Beale v. Macgregor*, 2 T.L.R. 311.

But though carelessness and delay do not disentitle the defendant to relief, they might afford ground for imposing terms: see *Cousins v. Cronk*, 17 P.R. 348.

Papers to be Filed.—When final judgment is entered the clerk is to file the summons and particulars of claim with the affidavit of the due service of both: Rule 160.

115. When due proof is made by affidavit or otherwise of the service of a special summons issued under section 113 of this Act, and of particulars of the plaintiff's claim or demand as required by the said section, and final judgment has not been entered under the provisions thereof, the Judge may, if the defendant does not in person or by agent appear in open Court pursuant to and as required by the summons, give judgment against the defendant by default, without requiring proof of the plaintiff's claim or demand, and with the same consequences and effect as if the plaintiff had proved his claim or demand in open Court. R.S.O. 1887, c. 51, s. 110.

Judgment
by default
under s. 113,
where final
judgment
not entered.

Due Proof.—The expression "due proof" here used must mean the sworn statement, in proper form, of such facts as in law show that proper service has been made. Where a person's property may be affected by a proceeding taken in his absence, it is important that all necessary precedent facts should clearly appear.

By Affidavit or Otherwise.—For form of affidavit see form No. 28.

For formal requirements of affidavits of service see Rules 262 to 269, and notes to section 103, and as to requisites of affidavits generally see notes to section 90. The affidavit need not contain anything more than the statute and rules require: *Baldwin v. Benjamin*, 16 U.C.R. 54.

It would be good though it stated that service was made on a certain day of the month "instant," without stating the year: *R. v. Tomb*, 4 U.C.R. 177.

As to requisites of service, see notes to section 103, rules 16 to 19, and 190. As to service on defendant out of jurisdiction see section 87, sub-section (2) and as to service on a foreign corporation see section 105: Rule 21.

The words "or otherwise," mean by any other evidence to which the court can look: *per Cotton, L.J.*, *Shelford v. Louth & E.C. Ry. Co.*, 4 Ex. D. at p. 319; *e.g.*, that the facts may be proved by oral testimony or other legal proof of service: *Caird v. Fitzell*, 2 P.R. 262; *Davis v. Pearce*, L.R. 5 C.P. 435, and the judge would not be justified in acting upon anything less than that.

Special Summons.—See notes to section 98 and 113: Rules 11 and 26. The special summons referred to is provided for by section 98. In all cases proof is required of the service of the summons and particulars of claim. As to actions which are the subject of special summons see notes

to sections 98 and 113. A special summons is to issue in all cases unless otherwise ordered by the plaintiff: Rule 149. The judge may amend at any time the wrong form of summons: Rule 26.

Particulars of Plaintiff's Claim.—See notes to section 98, *ante* pp. 154.

When claims are entered as, "To balance of account rendered," it is submitted that the judge would not be justified in giving judgment upon them under this section: *Wilkes v. B.B. & G. Ry. Co.*, 2 U.C.L.J. 230; *Villeneuve v. Wait*, 12 P.R. 505; see *Smart v. N. & D. R. Ry. Co.*, 12 C.P. 404.

The rendering of an account, simply, in ordinary transactions, not between merchant and merchant, and unreplyed to, does not constitute evidence of a complete admission of debt. In connection with other circumstances it may be some evidence but not of itself sufficient. But even then the account rendered should be produced, or secondary evidence thereof given.

The Judge May.—Ordinarily the word "may," when applied to the duties of judicial officers, is construed as imperative—as giving a *power* and not merely a *discretion*, which power must be exercised upon proof of the facts calling for its exercise: *Macdougall v. Paterson*, 11 C.B. 755; *R. v. Bishop of Oxford*, 4 Q.B.D. 525; *Cameron v. Wait*, 3 A.R. 194; *Aitchison v. Mann*, 9 P.R. 473. Whether that rule of statutory construction could be invoked here admits of doubt. There might be good reason for a judge refusing to give judgment in the absence of the defendant or of any one on his behalf. A claim beyond the jurisdiction of the court would, of course, furnish a case in point. But there are others, of which the same may be said. Claims for extortionate interest, or otherwise of doubtful character, should not be the subject of judgment by default, if the judge questioned their correctness or had doubts of their honesty. We think in such cases he could refuse judgment by default and call for proof of the claim: see *Parker v. Brand*, 7 T.L.R. 462.

It is submitted that the rule for a judge to observe in acting under this section is not to incline to a laxity of practice in giving judgment by default on the one hand, nor on the other hand arbitrarily to require proof of the claim by the plaintiff, but to mete out justice by not unnecessarily inconveniencing a plaintiff by requiring proof, nor do injustice to the defendant by a too hasty disposition of the case.

If the Defendant Does Not Appear in Open Court.—The expression "in open court" is evidently intended to mean a *visible* appearance of the defendant in court, personally or by an agent, and not the technical appearance, which a notice of dispute has been thought to imply.

The expression "in open court" as used to the English Debtors Act, 1869, has been held to mean "what any one would take to be a court, with the usual accompaniments of the jury box, the witness box, the judge's seat, and seats for solicitors, counsel and others:" *per Coleridge, C.J.*, and not to include the private room of a County Court Judge, though often used by him for hearing causes: *Kenyon v. Eastwood*, 57 L.J. Q.B. 455.

If a defendant gives notice disputing plaintiff's claim, and does not appear, the plaintiff would be entitled to his costs, including the costs of subpoena or summons to witnesses and service thereof, witness fees and his own expenses as a witness when taxable: *Fox v. Toronto & Nipissing Ry. Co.*, 7 P.R. 157; and other necessary and taxable costs, even of a commission, if costs are awarded by the judgment: *Howes v. Barber*, 18 Q.B. 588; *Fox v. Toronto & Nipissing Ry. Co.*, *supra*; *Browne v. Smith*, 1 P.R. 347; *Middleton v. Pollock*, 4 Ch. D. 49.

From the nature of proceedings in cases of attachment against absconding debtors, and considering the right of other creditors to intervene under Rule 28, it is submitted that this section would not apply to such cases: see *Offay v. Offay*, 26 U.C.R. 363.

Consequences and Effect of the Judgment.—Whatever rights the plaintiff would have on a judgment recovered in a contested case, the same are assured to him on a judgment by default under this section.

As to effect generally of judgments in Division Courts and the subsequent proceedings that may be taken thereon: see notes to section 7, *ante* p. 3, and also notes to sections 218 and 243.

For form of judgment: see form 78.

Notice by Clerk.—When judgment is given against a defendant pursuant to this section immediate notice thereof shall be given by the clerk, by letter or postal card, to the defendant: Rule 123 (*a*).

The clerk must be careful to be strictly accurate if he sends a card. If he should make any false statement therein, he might be subjected to an action for libel: *Whitfield v. S. E. Ry. Co.*, E. B. & E. 115; see *Green v. Minnes.*, 22 O.R. 177.

116.—(1) In any action within the meaning of section 113 of this Act, for the recovery of the sum of \$25 or upwards, the plaintiff in the action may, on an affidavit made by himself or by any other person who swears positively to the debt or cause of action, verifying the cause of action and stating that in his belief there is no defence to the action, concurrently with the service of the summons commencing the action, or at any subsequent time, serve the defendant with a notice of motion to show cause before the Judge of the Division Court in which the action is brought why the plaintiff should not be at liberty to have final judgment entered in his favour by the clerk for the amount of the debt or money demand sought to be recovered in the action together with interest, if any, and costs. A copy of the affidavit shall accompany the notice of motion. The Judge may thereupon, unless the defendant by affidavit or otherwise satisfies the Judge that he has a good defence to the action on the merits or discloses such facts as may be deemed sufficient to entitle him to defend the action, make an order empowering the Clerk to sign final judgment accordingly. 60 V. c. 14, s. 6. Upon the application of either party within seven days after making the said order, and upon good grounds being shown, the Judge may set aside such order upon such terms as he thinks reasonable. 61 V. c. 15, s. 5.

Motion for judgment.

(2) The application by the plaintiff for leave to have final judgment entered in his favour under the provisions of this section shall be made on notice returnable not less than two clear days after service.

(3) The defendant may show cause against the application by offering to bring into court the amount sought to be recovered in the action, or by affidavit. In the affidavit he shall state whether the defence he alleges goes to the whole or to part only, and if to part only then to what part of the

plaintiff's claim. And the Judge may, if he thinks fit, order the defendant to attend and be examined upon oath, or to produce any books or documents, or copies of, or extracts therefrom.

(4) In case it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim, or that any part of his claim is admitted to be due, the plaintiff shall be entitled to have final judgment entered forthwith for such part of his claim as the defence does not apply to or as is admitted to be due, subject to such terms, if any, as to suspending execution, or the payment of any amount levied, or any part thereof, into court by the bailiff, the taxation of costs, or otherwise, as the Judge may think fit; and the defendant may be allowed to defend as to the residue of the plaintiff's claim.

(5) If it appears to the Judge that any defendant has a good defence, or ought to be permitted to defend, and that any other defendant has not such defence, and ought not to be permitted to defend, the former may be permitted to defend, and the plaintiff shall be entitled to have final judgment entered against the latter, and may issue execution upon the judgment without prejudice to his right to proceed with his action against the former.

(6) Leave to defend may be given unconditionally, or subject to such terms as to giving security or otherwise, as the Judge may think fit. R.S.O. 1887, c. 51, s. 111 (2-6).

Within the Meaning of Section 113.—Wherever a summons can properly issue under section 113 "for the recovery of any debt or money demand" of \$25 or upward, "where the particulars of the plaintiff's claim with reasonable certainty and detail, are endorsed on or attached to the summons" &c., has been served on the defendant, then proceedings can be taken under this section on a motion for speedy judgment. The action must be one in which judgment by default could be signed under section 113, and an amendment to the summons and particulars after service of a notice of motion for judgment so as to comply with that section, will not give jurisdiction: *Gurney v. Small*, (1891) 2 Q.B. 584; *Clarkson v. Dwan*, 17 P.R. 92, 206; but see *Roberts v. Plant*, (1895) 1 Q.B. 597 and *Rules 4* and 239. But a motion may be made after amendment: *Paxton v. Baird* (1893) 1 Q.B. 139; *Bradley v. Chamberlyn*, (1893) 1 Q.B. 439.

A garnishee proceeding would not be within this section: *Cameron v. Allen*, 10 P.R. 192. Nor would a case where proceedings were taken against the defendant as an absconding debtor, because other creditors have the right to intervene: *Rule 28*; *Offay v. Offay*, 26 U.C.R. 363.

Where there is a *bona fide* notice disputing the jurisdiction of the court, the right to give judgment depends upon whether the court has jurisdiction. If it has no jurisdiction, *cadit questio*. If the jurisdiction is doubtful the judge may exercise his discretion whether or not to send the case to trial so that *viva voce* evidence may be heard. There seems

to be no necessity for a trial in court of such a question. A trial in court is for the purpose of disposing of actions within the jurisdiction and not primarily for the purpose of deciding the jurisdiction. It is submitted, therefore, that on a motion under this section, the judge may dispose of the question of jurisdiction, and if he decides he has none, may, on the application of either party transfer the case under section 91.

The Plaintiff in the Action.—The proceeding is optional with the plaintiff: *R. v. S. E. Ry. Co.*, 4 H. L. Cas. 471; and his making the application or not cannot affect his rights on the merits in any way: see *Gill v. Woodfin*, 25 Ch. D. 707; *Gibbings v. Strong*, 26 Ch. D. 66.

On Affidavit.—The affidavit which the statute requires must be made: *R. v. Judge of the Marylebone County Court*, 50 L.T. 97.

The affidavit must be made by the plaintiff himself or some person who swears positively to the debt or cause of action: see *Hallett v. Andrews*, 42 Sol. Jour. 68.

The affidavits should not only verify the cause of action, but also pledge the deponent's belief that there is no answer to the plaintiff's demand: *Kiely v. Massey*, 6 L. R. Ir. 445; see *Bradley v. Chamberlyn*, (1893) 1 Q.B. 439.

A statement that "I am advised and believe defendant has no defence on the merits" is sufficient: *Manning v. Moriarty*, 12 L.R. Ir. 372; but it should, it would seem, state the sources of knowledge: Rule 265.

The right to obtain judgment in this summary way is an extraordinary one, and all the facts necessary to be shown and the observance of all the requirements of the statute are conditions precedent to the due making of the order: *R. v. Judge Marylebone C.C.*, 50 L.T. 97; *Lloyd's Banking Co. v. Ogle*, 1 Ex. D. 262; *Runnacles v. Mesquita*, 1 Q.B.D. 416; *Crawford v. Gilmore*, 30 L.R. Ir. 238; *Sheppards v. Wilkinson*, 6 T.L.R. 13. It should not be granted when any serious conflict as to matter of fact or any real difficulty as to matter of law arises: *Id.*: *Electric Contract Co. v. Thomson-Houston Co.*, 10 T.L.R. 103; *Ward v. Plumley*, 6 T.L.R. 198. Though the defendant might, by distinctly waiving production of the affidavit or the allegation of certain necessary facts and agreeing to the plaintiff's statement of facts, give the judge power to make the order: see notes to section 95, *ante* p. 152; see also *Ex parte Butters*, *Re Harrison*, 43 L.T. 2; *Re Guy v. G. T. Ry. Co.*, 10 P.R. 372; and the consent to adjudication could not be withdrawn: *Harvey v. Croydon Union Rural Sanitary Authority*, 26 Ch. D. 249.

See notes to sub-section 6 of this section.

The debt or cause of action must be positively sworn to; there should not be any doubt appearing on the affidavit in that respect. The cause of action must be *verified*. What will satisfy the section in this respect must depend on the circumstances of each case.

"The defendant is justly and duly indebted to the plaintiff in the sum of \$, as per particulars annexed to the summons herein," has been held to be sufficient: *Murphy v. Nolan*, 18 L.R. Ir. 468; *May v. Chidley*, (1894) 1 Q.B. 451. The affidavit need not set out all the particulars.

For form of affidavit see Form No. 259.

Where the affidavit is defective in form and an application upon it fails in consequence, a second application can be made on fresh materials: *Wagstaff v. Jacobowitz*, W.N. (1884) 17; *Sykes Brewery Co. v. Chadwick*, 7 T.L.R. 258; *Payne v. Newberry*, 13 P.R. 392; but *semble*, not where it is defective in substance; *Id.*; see 13 M. & W. 560 (n); *R. v. Bodmin (Mayor)*, (1892) 2 Q.B. 21.

Concurrently with the Service of the Summons.—"To concur" means to "join or unite as in one action; Webster; and the expression used here must imply that the notice of motion for summary judgment may be joined with and served at the same time as the summons and particulars of claim as required in order to obtain judgment under section 113. The application may be made at any time after action commenced and before judgment.

Formerly the application could not be made until after a notice disputing plaintiff's claim had been filed: see R.S.O. (1887) c 51, s. 111.

It has been held, under the provisions of a rule similar to C.R. 603, which is practically the same in effect as this section, that if a plaintiff, after appearance by the defendant, takes a deliberate step to have an action tried by a jury, he cannot move for judgment in this summary manner; *Stewartstown Loan Co. v. Daly*, 12 L.R.Ir. 418; *Woodruff v. McLenman*, 11 P.R. 22.

Serve the Defendant with Notice of Motion.—The application of a plaintiff under this section shall be by notice to the plaintiff, his solicitor, or agent to be served upon the defendant, and no costs in respect of such application shall be taxed in the cause, except for service when made by the bailiff: Rule 130 (a). But the Division Court rules respecting applications cannot affect the procedure expressly provided for by statute. The motion must be made by notice of motion. No other form than that which the statute prescribes would be proper.

Substitutional service of the notice of motion could not be ordered. It is not "process"; see section 104.

The notice could be given by a solicitor or agent for the plaintiff, and even if given without his authority, but in plaintiff's name, it might be ratified by him: *Aneona v. Marks*, 7 H. & N. 686; *Blake v. Walsh*, 29 U.C.R. 545; *Vanderlip v. Smyth*, 32 C.P. 60.

The service of notice of motion on the defendant personally would undoubtedly be sufficient: see notes to section 103. But service, other than personal, can be effected. In *Ward v. Vance*, 9 U.C.L.J. 214, *Adam Wilson, J.*, said in regard to service of an attaching order and summons to pay over under the garnishment clauses of the Common Law Procedure Act: "The statute does not require in express terms" (as here) "that there shall be personal service as our King's Bench Act of 1822 did of the *Ca. Re.*, upon the defendant," and, "I am inclined to think that personal service is not imperatively demanded unless in those cases where it is sought,—that is, where it is the purpose and object, to charge the party with a contempt for not appearing to, or for not performing some act required by the writ, rule or order."

Sufficient service could be effected by serving defendant's wife at the dwelling house of defendant: *Hanns v. Johnston*, 3 O.R. 100; *Trust & Loan Co. v. Jones*, 8 P.R. 65; see, however, *Hays v. Armstrong*, 7 O.R. 621; or by leaving the notice of motion at the place of residence of the defendant with some grown up person there dwelling: *Re Solicitor*, 14 Ch. D. 152; *Carlisle v. Orde*, 7 C.P. p. 459; see also *Jones dem. Griffiths v. Marsh*, 4 T. R. 464; *Murray v. G.W. Ry Co.*, 6 P.R. 211; *R. v. North Riding of Yorkshire (Jus.)* 7 Q.B. 154, to the same effect.

The case of *Hogg v. Brooks*, 14 Q.B.D. 475, was decided on the strict language of the lease in question there, and does not impugn the authority of the cases previously cited here.

The following would not be sufficient: Service on a clerk of defendant at the defendant's counting house: *Rowland v. Vitzetelly*, 6 M. & G. 723; *Warwick v. Bacon*, 7 M. & G. 961; nor by leaving the notice at the club house of the defendant: *Davies v. Westmacott*, 7 C.B.N.S. 829; nor by leaving it with defendant's warehouseman at defendant's warehouse,

that being his place of business: *Ibottson v. Phelps*, 6 M. & W. 626; nor service on a workman on defendant's premises: *Hitchcock v. Smith*, 5 Dowl. 248; nor on a housekeeper at a place where several persons are residing without showing that she had authority to receive papers for defendant: *per Maule, J.*, *Lewis v. Blurton*, 7 C.B. 102; nor leaving it with the landress at defendant's office: *Dodd v. Drummond*, 1 Dowl. 381; *Kent v. Jones*, 3 Dowl. 210; *Alanson v. Walker*, 3 Dowl. 258; *Brown v. Wildbore*, 1 M. & G. 276; much less with the servant or assistant of the landress: *Smith v. Spurr*, 2 Dowl. 231; nor with the landlord or landlady of the house where the defendant lodges: *Salisbury v. Sweetheart*, 5 Dowl. 243; *Biddulph v. Gray*, 5 Dowl. 406; *Gardner v. Green*, 3 Dowl. 343; nor upon a female servant at defendant's lodgings: *Price v. Thomas*, 11 C.B. 543; nor by putting it under the door or into the letter-box of defendant's office: *Strutton v. Hawkes*, 3 Dowl. 25; *Braham v. Sawyer*, 1 D. & L. 466; *Consumers' Gas Co. v. Kiscock*, 5 U.C.R. 542; *Grand River Nav. Co. v. Wilkes*, 8 U.C.R. 249; *McCallum v. Pro. Ins. Co.*, 6 P.R. 101; nor by throwing it over the fence to defendant's son who refused to have anything to do with it: *McGuin v. Benjamin*, 1 Cham. R. 142.

Where service is made on a domestic servant at defendant's residence, the affidavit of service should show she is the defendant's servant: *Alanson v. Walker*, 3 Dowl. 258. And where it is made on some grown-up person at defendant's residence it should be shown that such grown-up person was in some way connected with defendant as a member of his family or otherwise: "that she was more than casually there:" *per Draper, C.J.*, *Carlisle v. Orde*, 7 C.P. 459. If served on defendant's wife, the affidavit should show it, and if on some other person the name should properly be given.

Service on a holiday would be good: *Clarke v. Fuller*, 2 U.C.R. 99; but not on Sunday: *R. v. Leommster*, 2 B. & S. 391. It is very doubtful if service on one of several partners would be good service of a notice of motion against the firm. The Consolidated Rules of practice are not applicable: *Clarke v. Macdonald*, 4 O.R. 310; *Bank of Ottawa v. McLaughlin*, 8 A.R. 543; *Pryor v. City Offices Co.*, 10 Q.B.D. 504; see notes to section 75. Section 112, it will be noticed, says service "of the summons" on one partner shall be good service on the firm. For the same reason an agent within section 105 cannot be served with notice of motion.

Service on a corporation must be made on the corporation itself through its proper officers. Casual knowledge acquired by one of its officers would not be good service: *Société Generale de Paris v. Tramways Union Co.*, 14 Q.B.D. 424. See also section 105.

Service of papers must be made by the bailiff: Rule 130, but if the defendant or his agent has given a notice of set-off, counterclaim, or other defence, the provisions of Rule 241 might be invoked, and the delivery or mailing of a notice of motion, as provided in that rule, would be sufficient service.

By appearing and arguing the question on the merits, without objection, the defendant would thereby waive any defect in the notice or any objection to the sufficiency of the time of service, or even to any notice at all: *Park Gate Iron Co. v. Coates*, L.R. 5 C.P. 634; *R. v. Stone*, 1 East, 649; *R. v. Shaw*, 12 L.T. 470; *R. v. Smith*, L.R. 2 C.C. 110; *Blake v. Beech*, 1 Ex. D. 320; *R. v. Hughes*, 4 Q.B.D. 614; *Ward v. Raw*, L.R. 15 Eq. 83; *R. v. Crouch*, 35 U.C.R. 433; *R. v. Widdop*, L.R. 1 C.C. 3; *R. v. Heffernan*, 13 O.R. 616; *R. v. Hall*, 12 P.R. 142; *Stoneman v. Lake*, 40 U.C.R. 320; see also *Dominion Coal Co. v. Kingswell Steamship Co.*, 30 N.S.R. 397.

The notice of motion and affidavits should, if possible, be filed with the clerk before the return day: *Re Rosier*, *Jones v. Bartholomew*, 49 L.T. 442; *Sear v. Webb*, 49 L.T. 94; and forthwith transmitted to the judge: Rule 152. For form of notice of motion see Form No. 301.

On the Merits.—See note to section 114 *ante* p. 190.

Make an Order.—See section 115 and notes thereto. When the judge has made an order empowering the clerk to sign final judgment under this section execution may issue thereon at any time thereafter: Rule 130. Rule 125 authorizes execution to issue forthwith. For form of order see Form No. 79.

Order for Judgment May be Set Aside.—The judge may set aside the order for judgment upon the application of either party "on good grounds shown." The grounds upon which the order for judgment would be set aside and the defendant allowed to defend after having had an opportunity of contesting the plaintiff's motion for summary judgment should be of a substantial character. A judgment regularly signed will only be set aside upon an affidavit of merits, that is, an affidavit disclosing substantial grounds of defence. And it is not probable that a judge would be satisfied with anything less than this on application to set aside the order. See notes to section 114, pp. 190-193.

Sub-Section 2. Not Less Than Two Clear Days.—This means two days at least, that is, excluding the day of service and the day when the motion is returnable before the judge: see cases cited in notes to section 96 *ante*. In Division Courts Sunday must be reckoned and service after two o'clock on Saturday afternoon would not be reckoned as of the following Monday, the Consolidated Rules not being applicable: *Clarke v. Macdonald*, 4 O.R. 310; *Bank of Ottawa v. McLaughlin*, 8 A.R. 543; *McLean v. Pinkerton*, 7 A.R. 490.

Married Women.—Judgment may be ordered under this section against the separate estate of a married woman, where the affidavit shows such facts as would, upon a trial, entitle the plaintiff to such judgment: *Durant v. Ricketts*, 8 Q.B.D. 177; *Kinnear v. Blue*, 10 P.R. 465; *Quebec Bank v. Radford*, 10 P.R. 619; *Cameron v. Rutherford*, 10 P.R. 620; *Nelson v. Thorner*, 11 A.R. 616; *Canadian Bank of Commerce v. Woodcock*, 13 P.R. 242; but if the debt were contracted prior to the 1st July, 1884 it is necessary to prove that the married woman has the same separate estate at the time of action as she had at that time: see *Pike v. Fitzgibbon*, 17 Ch. D. 454; *Turnbull v. Forman*, 15 Q.B.D. 234; *Scott v. Wye*, 11 P.R. 93, unless, perhaps she was at the time of contracting the debt carrying on separate business: *Berry v. Zeiss*, 32 C.P. 231; and see *Robertson v. Laroque*, 18 O.R. 469.

Cameron v. Heighs, 14 P.R. 56 contains a *dictum* that judgment against a married woman should not be given upon summary application, but in the result a judgment was ordered against a separate estate, subject to a reference, and the *dictum* has not been followed: *Nesbitt v. Armstrong*, 12 C.L.T. 43.

If the debt was contracted before 13th April, 1897, it is necessary to show that the married woman possessed separate estate at the time of the contract: *Field v. McArthur*, 27 C.P. 15; *Darling v. Rice*, 1 A.R. 43; *Palliser v. Gurney*, 19 Q.B.D. 519; *Stogdon v. Lee*, (1891) 1 Q.D. 661.

As to debts of married women, see *Married Women*.

An Indian is subject to summary proceedings under this section: *Bryce v. Salt*, 11 P.R. 112.

As to judgment by default against a married woman, see Rule 272: *Holby v. Hodgson*, 24 Q.B.D. 103 at p. 105.

As to form of such judgment see Rules 273 and 274, R.S.O. c. 163, section 4, see p. 189 *supra*.

Setting Up Defence.—The defendant may, by affidavit or otherwise, i.e., by other admissible evidence satisfy the judge that he has a good defence: *United Founders v. FitzGeorge*, 7 T.L.R. 620. It is a peculiar proceeding intended only to apply to cases where there can be no reasonable doubt that a plaintiff is entitled to judgment and where, therefore, it is inexpedient to allow a defendant to defend for mere purposes of delay: *Jones v. Stone*, (1894) A.C. 124.

The intendment is to prevent defences being set up against good faith for the purpose of gaining time; and where there is a fair probability of a good defence to the action on the merits shown by defendant he ought to be allowed to defend unconditionally: *Munro v. Orr*, 17 P.R. 53.

One of the methods employed in the higher courts for obtaining the necessary facts to satisfy the judge is by cross-examining the plaintiff. There is no discretion to refuse such cross-examination: *Kingsley v. Dunn*, 13 P.R. 300. There is no power in this court to grant cross-examination and the absence of that means of making out a defence should be considered by the judge on hearing the application. For instance judgment should not be ordered in an action on a note if the defendant deposed that the note was without consideration, invalid and fraudulent as to the first holders and that he believed plaintiffs were suing on behalf of the first holders, and had notice of the circumstances invalidating the note, although his affidavit did not state the facts as to such notice: *Farmers' Bank v. Sargent*, 17 P.R. 67; nor in such an action, if the defendant swears he would have a good defence against the payee of the note, and that he believes the plaintiff is not a *bona fide* holder for value and gives facts supporting or reasons for entertaining such belief: *Bank of Minnesota v. Page*, 14 A.R. 347. The sources of knowledge must always be stated: Rule 265, or the affidavit will not be received: *Bank of Toronto v. Kelty*, 17 P.R. 250; *Jones v. Mason*, 18 P.R. 442.

But it is not always necessary for the defendant to state the facts of his defence if the court is satisfied that there is a good defence on the merits or that the case is of such a nature that the trial should proceed in the usual way: *Farmers' Bank v. Sargent*, 17 P.R. 67. It is a valuable and important part of the new procedure that the means should exist of coming by a short road to final judgment where there is no real defence to the action. But it is of at least equal importance that the parties should not be shut out from their defence when they ought to be admitted to defend: *per Lord Selborne*, *Wallingford v. Mutual Society*, 5 App. Cas. 693; and the plaintiff should not be allowed to sign judgment merely because the defendant's affidavit does not show a complete defence: *per Brett, L.J.*, *Ray v. Barker*, 4 Ex. D. 279, at p. 283.

Defence on the Merits.—The defendant must disclose a defence upon the merits. He should state what his defence is, and should give reasons for thinking the defence substantial: *Runnacles v. Mesquita*, 1 Q.B.D. 416; *Dobie v. Lemon*, 12 P.R. 64. If the defendant's affidavits show a good defence, the court has no discretion and cannot order payment into court: *Ray v. Barker*, 4 Ex. D. 279. "The very rule itself contemplates that a man is to be let in to defend who can make out a defence:" *per Bramwell, L.J.*, *Harris v. Bottenheim*, 26 W.R. 362, 362. If, however, facts are raised which, although not satisfying the judge that there is a good defence, show there is a question to be tried, the judge may allow the defendant, either with or without terms, to raise such question, and fight it if he pleases. But the affidavits must condescend upon particulars. "You must give such an extent of definite facts as to satisfy the judge that there are facts which make it reasonable that you should be allowed to raise the defence:" *per Lord Blackburn*, 5 App. Cas. 704; *Davis v. Spence*, 1 C.P.D. 721; *Collins v. Hickok*, 11 A.R. 620. If the defendant does not make

out a clear defence on the merits, and the judge, in the exercise of his discretion, orders payment into court or security, his order will not be interfered with: *Nelson v. Thorner*, 11 A.R. 616. If the defendant swears to credits which should be given, it is improper to order him to give security for the full amount and in default to shut him out altogether from the opportunity of reducing the claim: *Wallingford v. Mutual Socy.*, 5 App. Cas. 695. A surety is generally entitled to require the plaintiff to prove his claim: *Lloyd's Banking Co. v. Ogle*, 1 Ex. D. 262. Indorsers who deny notice of dishonor may have the question tried: *Ontario Bank v. Burke*, 10 P.R. 561. An accommodation maker is entitled to have the question of whether the plaintiff gave value tried: *Hughson v. Gordon*, 10 P.R. 565; so, also, is the maker of a note alleging facts which constitute fraud or illegality: *Fuller v. Alexander*, 47 L.T. 443; *Bank of Minnesota v. Page*, 14 A.R. 347; *Millard v. Baddeley*, W.N., (1884) 96; *Wing v. Thurlow*, 10 T.L.R. 53, 151; *Brooks v. Aylmer*, 73 L.T. Jour. 80; or where he alleges an agreement to renew, and a tender of renewals pursuant thereto: *Federal Bank v. Hope*, 6 O.R. 209; *Lowden v. Martin*, 12 P.R. 496; or where he shows that there is a difficult question of law to be tried: *Electric Contract Co. v. Thomson-Houston Co.*, 10 T.L.R. 103; see *Crawford v. Gilmour*, 30 L.R. Ir. 238.

In an action on a covenant in a mortgage where defendant swore he had a good defence on the merits, and that the mortgage was signed by him on the express understanding that he was not to be personally liable, and his affidavit was supported by another person; and it appeared, moreover, that the blanks in the printed form of covenant had not been filled up, the defendant was allowed to defend unconditionally: *Munro v. Orr*, 17 P.R. 53; *Patterson v. McLean*, 21 O.R. 221. Where it appeared on a motion for summary judgment that the special endorsement on the writ was not in conformity with the facts and so failed to verify the claim the court held that no amendment could be permitted upon the motion; nor could judgment be given in accordance with the special endorsement: *Clarkson v. Dwan*, 17 P.R. 92, 206. But rule 239 seems to be wide enough to permit of any amendment being allowed.

In an action on a note endorsed by the payees to the plaintiffs, whose manager swore that they were the holders thereof in due course for value, the defendant deposed that he had never received any consideration for the note, that he made it for the accommodation of the payees; that he had heard the local manager of the plaintiffs say that the note was not discounted by them but was simply left with them; that he believed the local manager was aware when he received the note that it was an accommodation note, and was also aware of the arrangement entered into between the company and the defendant at the time the note was made, and that an accountant placed by the plaintiffs in charge of the books of the payees was present when that arrangement was made. He did not state that the local manager had the requisite notice to affect the plaintiffs, nor the grounds of his belief that he had such notice; nor did he state that the accountant referred to had any notice or knowledge of the agreement referred to; nor did he adduce any hearsay evidence to support the defence attempted to be set up; Held that the defendant had not shown satisfactorily that he had a good defence upon the merits, nor disclosed such facts as should be sufficient to entitle him to defend: *Bank of Toronto v. Kielty*, 17 P.R. 250. See also *Jones v. Mason*, 18 P.R. 442.

Where the plaintiff relied on an estoppel, but the defendant set up facts which made the estoppel debatable, it was held in the Privy Council that he should have been let in to defend: *Jones v. Stone*, (1894) A.C. 122.

Where in an action on a bill of exchange the defendant's affidavit stated: "I have been informed by the agent of the Havana Cigar Co., by

whom the bill of exchange sued on herein was drawn, and from such information I verily believe that the plaintiff herein is not and was not, at the time this action was brought, the holder of the said bill of exchange." And no other facts being stated it was held that there was nothing to satisfy the judge that the defendant should be entitled to defend. On the argument further affidavits were read on behalf of the defendant to which plaintiff replied and on the facts disclosed in these later affidavits the defendant was allowed an opportunity of substantiating his defence on paying into court the amount of plaintiffs' claim: *Banque d'Hoehelaga v. Maritime Ry. News Co.*, 29 N.S.R. 358.

The judge must, however, exercise his discretion in each case, though he is bound on a defence on the merits being disclosed to his satisfaction to refuse the order: *Shurmur v. Young*, 33 Sol. Jour. 155; *Thompson v. Marshall*, 28 W.R. 220. But where his legal liability is clear, the court will refuse to give leave to defend: *Nassau Press v. Tyler*, 70 L.T. 376; *Dane v. Mortgage Insurance Cor.*, (1894) 1 Q.B. 54.

Where land was held by a trustee for the owners and executed a mortgage for their benefit, which without his knowledge contained a covenant to pay the mortgage debt, the covenant was held not to be enforceable against him personally by the assignees of the mortgage for value without notice, the remedy being restricted to foreclosure proceedings against the land: *Patterson v. McLean*, 21 O.R. 221.

Where a defendant admitted part of the claim, but set up a counterclaim for a larger amount, judgment was refused: *Court v. Sheen*, 7 T.L.R. 556; and where the defendant showed a *bona fide* complaint against the plaintiff as a ground of defence or counterclaim leave to defend was given unconditionally: *Ford v. Harvey*, 9 T.L.T. 328; and, *a fortiori*, where the defence is a set-off: *Groom v. Rathbone*, 41 L.T. 591; *Commee v. The C.P. Ry. Co.*, 11 P.R. 222; unless the counterclaim or set-off be too vague or misty to justify delaying the plaintiff: *Bank of Ottawa v. Johnston*, 9 C.L.T. 251. But see *Hoby v. Birch*, 62 L.T. 404.

In short, where a defendant shows there is a "fair probability of a defence," unconditional leave to defend ought to be given: *Ward v. Plumbley*, 6 T.L.R. 198; *Carver v. Buccleuch*, 33 Sol. Jour. 286; or where a defence is shown on the merits or facts which upon development or cross-examination amount to a defence, or where an arguable point of law or fact is raised, the power to order judgment should be carefully and sparingly exercised, and never, unless that it can be shown that the plaintiff may be seriously prejudiced by waiting for the trial: *Barber v. Russell*, 9 P.R. 433.

Leave to defend unconditionally has been given on the following issues of fact being raised: Where there is a fair dispute as to the meaning of the document on which the claim is based: *Bowes v. Caustie Soda Syndicate*, 9 T.L.R. 328; whether the plaintiff has performed his part of the contract: *Ford v. Harvey*, 9 T.L.R. 328; whether the relation of the parties was that of principal and broker or that both were acting as principals: *Lindsay v. Martin*, 5 T.L.R. 322; where the contract required the goods to be packed for sending abroad and defendants claimed they were entitled to deduct expenses of repacking: *United Gutta Percha Co. v. Welch*, 14 T.L.R. 154; whether defendant was liable as purchaser for the price or as auctioneer for commission: *Tobin v. Connolly*, 12 Ir. L.T. 138. Where the facts are not clear and free from doubt judgment should not be ordered: *Stephenson v. Dallas*, 13 P.R. 450; or, in other words, it must appear to a demonstration on the whole case that the defendant has no defence: *Fell v. Williams*, 3 C.L.T. 358.

The affidavit of the defendant need not be confined to facts within his knowledge. Where, however, his allegations are made upon information and belief, the sources of knowledge must be shown: Rule 265;

Harrison v. Bottenheim, 26 W.R. 362. Where there is, in the opinion of the judge, something due, he may order judgment to be entered to stand as security until the correct amount be ascertained; but execution should not be issued or levied upon without leave: *Wallingford v. Mutual Society*, 5 App. Cas. 685; and where the action is upon a solicitor's bill, the order will refer the bill to taxation and order judgment for the amount taxed: *Smith v. Edwardes*, 22 Q.B.D. 10. A money lender who had charged an usurious discount was, on moving for immediate judgment, limited to five per cent.: *Parker v. Bland*, 7 T.L.R. 462.

Affidavits in reply should not generally be allowed: *Davis v. Spence*, 1 C.P.D. 719; *Girvan v. Grepe*, 13 Ch. D. 174; but, in *Rotheram v. Priest*, 49 L.J.C.P. 104, an affidavit in reply was allowed; and, where the affidavits in reply are of all those who know of the dealings between the plaintiff and the defendant and negative the defendant's story, the defendant should be ordered to pay the money into court: *Dunnet v. Harris*, 14 P.R. 437. It was held in Manitoba that anything which could have been pleaded by a defendant under the old statutes of set-off can now be brought forward in answer to an application for leave to sign judgment, and will prevent an order being made allowing judgment to be signed: *Manoque v. Mason*, 3 Man. L. R. 603. An application to sign judgment against one defendant was refused in the absence of evidence as to the position of the action with reference to the others: *Stewart v. Richard*, 3 Man. L.R. 610.

Where a judgment by default of appearance has been irregularly signed, the plaintiff cannot, while insisting on the regularity of his judgment, take the alternative course of moving for summary judgment: *Smith v. Logan*, 17 P.R. 121, 219.

Defendant May Bring Money Into Court.—A defendant is not entitled to defend upon bringing the money into court, without an affidavit of merits: *Crump v. Cavendish*, 5 Ex. D. 211; see *Rotheram v. Priest*, 49 L.J.C.P. 104; *Wallingford v. Mutual Society*, 5 App. Cas. 685.

If the plaintiff succeeds in the action he is entitled to the money paid into court: *Bird v. Barstow*, (1892) 1 Q.B. 94. If the defendant succeeds he is entitled to have the money paid out to him, though notice of appeal may be given: *Yorkshire Banking Co. v. Beatson*, 4 C.P.D. 213. See *Runnacles v. Mesquita*, 1 Q.B.D. 416; *Ray v. Barker*, 4 Ex. D. 279.

Defence as to Part.—Where it appears on the application that the defence set up applies only to a "part of the plaintiff's claim, which is admitted to be due, the clerk shall, on the order of the judge, at the request of the plaintiff, forthwith enter final judgment for such part thereof as the defence does not apply to, or as is admitted to be due:" Rule 129.

Under 56 Vic. c. 15, s. 3, now incorporated with and forming the last clause of section 113, and by Rule 117, an order of the judge is not necessary if it appears on the defence that it applies only to a part of the claim: see notes to section 113. The order under Rule 129 may be made before the motion is finally disposed of. Judgment for the part of the claim not disputed will not be a bar to the recovery of the remainder.

It cannot be made a condition of the defence for the remainder that the part admitted be paid: *Dennis v. Seymour*, 4 Ex. D. 80.

The court may require that execution be not issued even for the part admitted: or that the amount remain in court until the whole dispute be decided, or may refuse judgment so that complete justice may be done: *Spears v. Fleming*, 36 C.L.J. 166. Care should be taken that the defendant will, in no event, be compelled, after paying part, to resort after the final hearing, to execution against the plaintiff.

Defendant May be Examined on Oath.—The order for defendant's examination may be granted either on a formal application before hearing the motion, or to remove doubt from the judge's mind after hearing the material he has before him: *Cockerell v. Van Diemen's Land Co.*, 16 C.B. 261. The order should not be made except during the pendency of the application for judgment and after service of the notice of motion: *Traders Bank v. Kean*, 13 P.R. 60. Counsel or agents for both parties should have an opportunity of being present and taking part in such examination: *Assessment Appeal*, 6 C.L.J. 295; and if that opportunity was not accorded, then the depositions should not be received or acted upon: *Stephenson v. Dallas*, 13 C.P. 450.

It is submitted that the plaintiff is entitled to an order for the examination of the defendant and for production of documents: *Morgan v. Thomas*, 9 Q.B.D. 643; *Metrop. Bd. of Works v. Steed*, 8 Q.B.D. 415; *Stroud* 537.

In case of disobedience of the defendant he could be committed: *Section 75*; *Martin v. Bannister*, 4 Q.B.D. 491; *Richards v. Cullerne*, 7 Q.B.D. 623; see notes to section 75 *ante* p. 115. The statute makes no provision for the examination of a defendant corporation or any other person than the defendant. A person making an affidavit on behalf of the defendant could not be examined.

Production of Documents.—This provision as to production is independent of that contained in Rule 287 which has a more general application and extends to all documents in the possession, power or control of either party to an action: see notes to section 137. The object in ordering production in this case, it is submitted is merely to satisfy the judge whether the defence is genuine or not. A minute examination or inspection should not be allowed the opposite party, which in the opinion of the judge might prejudice the defendant at the trial. The plaintiff should not be allowed a full discovery of the defendant's evidence in doubtful cases, when he cannot be compelled to make discovery himself: *Coyle v. Coyle*, 36 C.L.J. 129.

Costs of Examination.—No provision is made for payment of the travelling or other expenses of the defendant in attending to be examined. Rule 130 provides that no costs of the application for summary judgment under this section shall be taxed in the cause, except for service of when made by the bailiff: but it is submitted that the judge may in the order impose pre-payment of the defendant's conduct money as a condition of his attendance. See Form No. 274.

Counsel Fees.—Where a defence is put in disputing a claim for more than \$100 and a counsel or solicitor has been retained to make an application under this section and an order is made empowering the clerk to enter judgment a counsel fee may be allowed by the judge under section 214.

Leave to Defend Conditionally.—Where the only question was whether recognized agents of the defendants had exceeded their authority in borrowing moneys for the defendant's business, leave to defend was granted conditionally on payment into court: *Hong Kong and Shanghai Banking Co. v. Harris*, 14 P.R. 437. See also *Banque d'Hochelaga v. Maritime Ry. News Co.*, 29 N.S.R. 358. An order giving the defendant leave to defend upon payment into court within a certain time need not be served: *Hopton v. Robertson*, 23 Q.B.D. 126 (n); *W.N.* (1884), 77; *Farden v. Richter*, 23 Q.B.D. 124; *Cranston v. Blair*, 15 P.R. 167.

117. The Judge at any time before judgment actually entered, although the time for giving the notice disputing the plaintiff's claim has expired, may, on sufficient grounds shown, and on such terms as he thinks just, grant leave to

leave to
dispute
claim at
any time
before
judgment.

the defendant to dispute the plaintiff's claim, in which case the requisite notice disputing the claim shall immediately be left with the Clerk, and also sent to the plaintiff, by prepaid letter through the post or otherwise. R.S.O. 1887, c. 51, s. 112.

Before Judgment Actually Entered.—If the clerk is in the act of entering up judgment it is not actually entered: *Harris v. Andrews*, 3 U.C.L.J. 31; see *Smith v. Logan*, 17 O.R. 121, 219, in which it was held that a judgment in the High Court is not complete, valid and effectual until the law stamps representing the fees payable in respect of the proceedings, have been impressed or placed thereon, and an appearance tendered to be filed after all the work of signing judgment by default has been completed except the attaching of the stamps should be received and entered.

Time for Giving Notice has Expired.—See section 113.

On Sufficient Grounds Shown.—The grounds for applying for leave to defend must be shown by affidavit: Rule 277; and the application may be made *ex parte* by the defendant or his solicitor: *Ib.*

The words "on sufficient grounds shown" do not mean that the judge has an arbitrary power in this respect. It is imperative, not discretionary on his part to hear the application: *McDougall v. Paterson*, 11 C.B. 755; notes to section 174; see also notes to section 113, as to grounds on which defence should be allowed.

On Such Terms, etc.—See notes to section 113, sub-section 3.

Notice Disputing the Claim.—"Immediately" means "within such time as is reasonably requisite," synonymous with "forthwith;" as to which see notes to sections 24 and 91; *Stroud* 365.

Where leave has been granted to a defendant to dispute the plaintiff's claim and the requisite notice has been left with the clerk under this section, the clerk shall send to the plaintiff, his solicitor or agent, notice of such order, specifying at what sittings of the court the case will be tried: Rule 167. The notice may be addressed as required by rule 241 and should be registered: Rules 169, 300.

With-
drawal of
defence.

118. A defendant who has filed a notice of defence in any action may, by notice in writing to the Clerk, at least six days before the sittings at which the same may be tried, withdraw such defence, and consent that judgment be entered against him for any amount, and the Clerk shall immediately notify the plaintiff thereof by mail, and thereupon the plaintiff shall be entitled to have judgment entered by the Clerk as by default for such amount, and the costs necessarily incurred. R.S.O. 1887, c. 51, s. 113.

Notice in Writing.—All notices required by this Act must be in writing: section 97; Rule 240; and the notice required under this section must be sent by mail, prepaid and registered: Rule 169.

At Least Six Days.—This means clear days: notes to section 116, *ante* p. 200.

Immediately Notify.—See notes to section 117, *supra*, and to section 24, p. 19.

As by Default.—See notes to section 113. Under section 113 the clerk can only enter judgment by default after the return day of the summons.

Under this section the judgment may apparently be entered as soon as the defence is withdrawn, though the return day may not have arrived: see *Turner v. Lucas*, 1 O.R. 623; *Heaman v. Seale*, 29 Gr. 278. For form of notice see Form 203.

119. In any case in which the defendant, primary debtor or garnishee has given the Clerk notice that he disputes the plaintiff's claim, or any other notice of which the plaintiff should be informed before the trial, or in any case in which it has become the duty of the Clerk to give notice to any party to a cause of any defence, admission, Judge's order or other matter, of which he should be notified before the trial, such notice shall show the place and time of the sittings of the Court at which the cause is to be heard. 52 V. c. 12, s. 25.

Requisites
of notices.

Requisites of Notices.—All notes required by the Act must be in writing: section 97. All notices required by the rules or by the practice of the court shall be in manuscript or print, unless expressly authorized by the court or a judge or by the rules to be given orally: Rule 240. All notices sent by the clerk to any of the parties to a suit through the post-office must be registered: Rule 169.

All necessary notices sent by the clerk shall be prepaid and registered: Rule 300.

It is submitted that under this section all notices enumerated must be in writing, and could not be given orally, though authorized by the court or a judge under Rule 240; and also that, under the provisions of section 97, all notices given by one party to any other party to an action must be in writing, notwithstanding the rule above referred to.

Trial.

120. In cases in which a trial is to be had, the defendant shall, on the day named in the summons, either in person or by some person on his behalf, appear in the court to answer, and, on answer being made, the Judge shall, without further pleading or formal joinder of issue, proceed, in a summary way, to try the cause and give judgment; and in case satisfactory proof is not given to the Judge entitling either party to judgment, he may nonsuit the plaintiff; and the plaintiff may, before verdict in jury cases, and before judgment pronounced in other cases, insist on being nonsuited. R.S.O. 1887, c. 51, s. 114.

Judge may
summarily
dispose of
cause or
non-suit
plaintiff.

Cases in which a Trial is to be Had.—As to the manner in which the cases to be tried are to be set down, see sections 121 and 171, and Rules 155 and 157.

As to the appointment of the times and places at which courts are to be held, see section 8.

Parties Should Appear.—“It is not usual to strike out a cause when the parties do not appear at the first call; that is if the court has not been sitting for half an hour, or longer, after the hour appointed for the court; they are commonly ‘put aside for the present,’ or placed at the ‘foot of

the list;' but the practice in different courts varies in this particular. It is always advisable that plaintiff should be present at the opening of the court, or immediately after, even though his case should stand low on the list, for all those previously entered may be put below his, or be otherwise disposed of. As to the defendant, it is essential that he should be present, for the case may be called on in his absence and judgment by default pass against him. Punctuality is necessary to despatch; and if parties suffer from their own negligence, they have no right to complain. The plaintiff may appear by attorney or by agent, if he finds it inconvenient to appear personally. Any neighbor or member of the plaintiff's family may act as agent: but an appearance by some one must be made in the plaintiff's behalf:" 2 U.C.L.J. 61. At one time it was held that no one but a barrister or attorney could appear for another in Division Courts; but the statute now permits "any person" to appear: section 126.

Judge shall Try the Cause.—It is the duty of the judge to try the cause and give judgment. If satisfactory proof is not given entitling either party to judgment, he may nonsuit. If the plaintiff does not elect to be nonsuited, the judge, if he has heard both sides, and is of opinion that the defendant has proved his defence, should give judgment for the defendant. When a case is being tried before a judge without a jury, he should hear the whole case, and not give judgment until all the evidence has been heard. It is different when a case is being tried with a jury. There, if the judge is of opinion that there is no evidence to submit to them, he may withdraw the case from their consideration. If the judge is wrong, the case must go back to a jury for a new trial: *Baker v. G.T. Ry. Co.*, 11 A.R. 68; *Pryor v. City Offices Co.*, 10 Q.B.D. 504. "When a judge tries a case without a jury, his position is very different. He has to decide the facts as well as the law:" *Macdonald v. Worthington*, 7 A.R. 564. If he is wrong, a Court of Appeal, in appealable cases, may reverse him upon the facts or upon the law; but they would have no right to reverse the verdict of a jury, when there was proper evidence to submit to them: *Johnson v. Provincial Ins. Co.*, 27 C.P. 464; *Dublin, Wicklow & Wexford Ry. Co. v. Slattery*, 3 App. Cas. 1155; *Metropolitan Ry. Co. v. Wright*, 11 App. Cas. 152; *Seaton v. Sheridan*, 12 T.L.R. 285; *Spencer v. Jones*, 13 T.L.R. 174; *Webster v. Freideberg*, 17 Q.B.D. 736; *Commissioner of Railways v. Brown*, 13 App. Cas. 133; *Hampson v. Guy*, 64 L.T. 778; *Ferrand v. Bingley Local Board*, 56 J.P. 277; *Brown v. Commissioner of Railways*, 15 App. Cas. 240; *Australian Newspaper Co. v. Bennett*, (1894) A.C. 284; *Brisbane v. Martin*, (1894) A.C. 249; *Dallas v. G.W. Ry. Co.*, 57 J.P. 584; unless the evidence so strongly preponderates in favor of one party as to lead to the conclusion that the jury in finding for the other party, have either wilfully disregarded the evidence, or failed to understand and appreciate it: *Connecticut Mutual F. Ins. Co. v. Moore*, 6 App. Cas. 656; *Aitken v. McMechan*, (1895) A.C. 310; see *Bray v. Ford*, (1896) A.C. 44.

If neither of the parties appear at the trial the judge may either strike out the case or postpone the trial and in the latter case the clerk shall notify the parties by post card of the adjournment and of the date of the sittings to which it has been adjourned: Rule 286.

As to the distinction between cases tried by a judge and cases tried by a jury, see *Morrow v. The C. P. Ry. Co.*, 21 A.R. 149; *Taylor v. Smith*, (1893) 2 Q.B. 65. A judge has no power to try a case in the absence of the plaintiff: *Jordan v. Jones*, 44 J.P. 800. It is submitted that the proper course would be to order a nonsuit.

Judge May Inspect Subject Matter of Action.—The judge may in his discretion, inspect or order the jury to inspect any property or thing concerning any question which may arise: Rule 279.

The judge may also order the detention, preservation, inspection, surveying or measuring of any property or thing being the subject matter of an action or matter as to which any question may arise therein: Rule 257; see notes to section 148, or he may, when a *prima facie* case of liability is established make an order for the preservation or interim custody of the subject matter of litigation, or order that the amount in dispute be brought into court or otherwise secured: Rule 259; see notes to section 148.

May Nonsuit the Plaintiff.—The judge may nonsuit the plaintiff even against his will:—"In cases where the hearing is by jury he has the same power as in ordinary cases;" Rule 275. In ordinary cases, "in case satisfactory proof is not given to the judge entitling either party to judgment, he may nonsuit the plaintiff." Giving a literal construction to these words, the judge may possess a larger power to nonsuit than the judges of other tribunals. But it is submitted that the judge should not nonsuit unless there is no evidence upon which twelve reasonable men might find a verdict for the plaintiff: *Ryder v. Wombwell*, L.R. 4 Ex. 32, 39; *Giblin v. McMullin*, L.R. 2 P.C. 317; *Steward v. Young*, L.R. 5 C.P. 122, 128; *Daniel v. Metropolitan Ry. Co.*, L.R. 5 H.L. 45; *Jackson v. Metropolitan Ry. Co.*, 3 App. Cas. 193; *Avery v. Bowden*, 6 E.&B. 953, 974; *Moore v. Connecticut Mut. Life Ins. Co.*, 6 S.C.R. 644.

Formerly a judge on the trial of an action in the Division Court had no power to direct the jury to bring in a particular verdict: *Re Lewis v. Old*, 17 O.R. 611; *Cowan v. Affie*, 24 O.R. 358; or to direct the jury to answer any questions of fact stated by him for the purpose: *Re Jones v. Julian*, 28 O.R. 601. But under 62 Vic. c. 11, s. 9, (section 175a), the judge may in proper cases direct a nonsuit or dismiss the action, and may direct the jury to answer any questions of fact stated to them by him and enter such judgment upon their answers as he may think proper. The judge also has power to determine the law and direct the jury thereon.

The judge is bound to hear the whole of the plaintiff's evidence and he cannot non-suit a plaintiff on counsel's opening address to the jury: *Fletcher v. London & N. W. Ry. Co.*, (1892) 1 Q.B. 122; see *Brearely v. London & N. W. Ry. Co.* 15 T.L.R. 237.

A non-suit should not be granted on a motion for a new trial on a ground which if raised at the trial could have been cured by amendment: *Clarke v. Barron*, 6 A.R. 309. No more inflexible rule has ever obtained in the courts than that you shall not raise a question after a trial which has not been raised at the time, which question, if it had been raised, could have been answered by evidence on the other side: *Victoria Corporation v. Patterson*, (1899) A.C. 615, 619.

In an action of contract, a plaintiff may be nonsuited as to some or one of several defendants, though judgment by default has been entered against the others: *Benedict v. Boulton*, 4 U.C.R. 96; *McNab v. Wagstaff*, 5 U.C.R. 588; and, if a joint contract, the nonsuit to those defending would enure to the benefit of those who did not defend: *per Robinson, C.J.*, at p. 97 of 4 U.C.R.; see also *Commercial Bank v. Hughes*, 3 U.C.R. 361; 4 U.C.R. 167; *Revett v. Brown*, 5 Bing. 7; *McNab v. Wagstaff*, 5 U.C.R. 588. If a defendant moves for a nonsuit and afterwards examines witnesses, the plaintiff is entitled to any benefit which he can obtain from the defendant's evidence: *Broek v. McLean*, Tay. R. 398; *Allen v. Carey*, 7 E. & B. 463. A plaintiff may be nonsuited on an interpleader issue: *Bryson v. Clandinan*, 7 U.C.R. 198. There may be a nonsuit after payment of money into court: *Gutteridge v. Smith*, 2 H. Bl. 374; or after plea of tender: *Anderson v. Shaw*, 3 Bing. 290; *Oakes v. Morgan*, 8 C.L.J. 248. A plaintiff may take a nonsuit at any time before the pronouncing of a verdict by a jury, but not

after it is rendered and before it is recorded: *Van Allen v. Wigle*, 7 C.P. 459; *Outhwaite v. Hudson*, 7 Ex. 380. Where the judge gave judgment against the defendant at the trial on a summons issued as to the plaintiff by a wrong name, no amendment having been made at the trial, a nonsuit was ordered with costs: *per Forbes, Co. J.*, *Miller v. Flewelling*, 17 C.L.T. 265.

Before Judgment Pronounced.—A judgment may be said to be “pronounced” when the judge publicly and openly declares the decision of a case: *Worcester*; see notes to section 158.

Insist on Being Nonsuited.—With the object if necessary of suing again. It is submitted that if the judge pronounces his decision on the case, giving judgment for the defendant, a plaintiff cannot insist on taking a nonsuit, even if the judgment so pronounced is not noted by the judge: *Van Allen v. Wigle*, 7 C.P. 459.

The effect of a nonsuit is that parties are left in the same position, except as to costs, as if the suit had never been commenced. Of course judgment of nonsuit entitles a defendant to his costs unless otherwise ordered: see section 213.

As to judgment of nonsuit on application for a new trial, see section 152 and notes thereto.

Judge May Sit and Transact Business at Any Time.—Subject to rules of court the judge of the County Court, or any other judge acting for him, shall have power to sit and act at any time for the transaction of the business of the Division Court or for the discharge of any duty which by any statute or otherwise was formerly required to be discharged out of or during the regular sitting of the court; Rule 254.

This gives to the Division Court judges similar powers as those possessed by the High Court and County Courts: see *Judicature Act, R.S.O. c. 51, ss. 82 to 91*.

Adjournment of Trial.—When anything required by the practice of the court to be done by either party, before or during the hearing, has not been done, the judge may adjourn the hearing to enable the party to comply with the practice: Rule 250. Similar powers are conferred in garnishee cases by section 203.

No power of adjournment is conferred in cases where steps are prescribed to be taken without reference to the hearing, as, for instance, application to change the venue under section 90, application for renewal of summons under Rule 25, and application for jury under section 162. See section 124 and notes thereto.

Order in
which
actions to
be tried.

Evidence to
be taken
down.

121. The Clerk shall place all actions in which the sum sought to be recovered exceeds \$100 at the foot of the trial list, and the other actions on the list and business of the Court shall be disposed of before entering upon the trial of any of the first mentioned actions, unless the Judge for special reasons otherwise orders; the Judge shall, in such cases when no agreement not to appeal has been signed and filed, take down the evidence in writing, and shall leave the same with the Clerk of the Court, but in the event of an application for a new trial it shall be forwarded to the Judge by the Clerk for the purposes of such application. *R.S.O. 1887, c. 51, s. 115.*

The Trial List.—Suits for amounts exceeding \$100 must be placed at the foot of the list. Under the provision of Rule 155, the clerk is to prepare three lists, namely, a jury list, a judge's list, and a judgment debtor's list. In the jury list and judge's list all cases where the amount claimed does not exceed \$100 shall be entered first, and, subsequently, all cases in which the amount exceeds \$100 shall be entered in the order in which they were received by the clerk for suit. In the judgment debtor's list the cases must be entered in the order in which the summonses for examination were issued. All interpleader issues, where the value of the goods or the proceeds thereof exceeds \$100, or where the damages claimed exceed \$60, shall be entered among the causes in which the sum claimed exceeds \$100. But the judge may dispose of the causes in the order that may seem most convenient to him. The lists must be divided into and ruled with these headings: (1) The number on the list (to be stated consecutively); (2) the year number of the summons; (3) the style of cause; (4) the nature of the subject of the action, whether for tort, or in replevin, or an interpleader, or a judgment summons, etc.; (5) the amount claimed (if any); (6) the judgment, or order, or disposition made of the case by the judge. These lists can conveniently be kept in a book, which will form a record of the business done at each sitting of the court.

For Special Reason or Reasons.—The change should not be made unless the judge, in the exercise of a judicial discretion, should determine, on the facts before him, that a reason or reasons existed for not disposing of the ordinary business of the court first. In every case the reason for deviating from the general rule must be determined according to its own particular circumstances.

Evidence in Writing.—Where there is no agreement not to appeal, it is imperative on the judge to take down the evidence in *writing*. As the judge on appeal may refuse to consider any question not raised before the judge below, it is suggested that the notes of evidence should be as full as possible and should comprise not only the evidence of the witnesses, but all points of law and all questions respecting the reception or rejection of evidence, and the decision upon any motion for nonsuit, or otherwise, arising at the trial, as fully as notes are usually taken of trials at *nisi prius*: see *Williams v. Evans*, L.R. 19 Eq. 547; *R. v. London (Judge)*, 7 L.T. 95, and notes to section 154.

As to agreement not to appeal, see notes to section 122. The omission to take down the evidence would not invalidate the trial of the cause: *Bank of Montreal v. Statten*, 1 C.L.T. 66; *Sullivan v. Francis*, 18 A.R. 121. Section 161, sub-section 2, makes the provisions of this section applicable to interpleader issues.

The appellate court might dispense with the judge's notes: *Morgan v. Davies*, 3 C.P.D. 260. And the judgment of the Division Court might be upheld on other grounds than those on which it proceeded: *Chapman v. Knight*, 5 C.P.D. 308; but costs might be refused: *Page v. Austin*, 7 A.R. 1; *Garrett v. Roberts*, 10 A.R. 650.

122. No appeal shall lie if before the Court opens, or if without the intervention of the Judge before the commencement of the trial, there shall be filed with the Clerk, in any case, an agreement in writing not to appeal, signed by both parties, or their solicitors or agents, and the Judge shall note in his minutes whether such agreement was so filed or not, and the minutes shall be conclusive evidence upon that point. R.S.O. 1887, c. 51, s. 116.

Parties
may agree
not to
appeal.

No Appeal.—The clauses regulating appeals under this Act will be found in sections 154 to 159 and the general law bearing on the same in the notes to those sections.

Court Opens.—The court is considered open when the bailiff has made proclamation declaring the court open for the transaction of business.

Before the Commencement of the Trial.—The evident intention is to prevent the judge in any way making any suggestion, or using persuasion against the right of appeal. He should be perfectly indifferent as to either course and leave the parties free to choose which they deem best. The "commencement of the trial" is a term of somewhat uncertain meaning. The trial would certainly have commenced if the jury had been sworn; or in a case tried by the judge if any evidence had been given whether oral or otherwise: see *R. v. Gibson*, 16 O.R. 704.

Agreement in Writing.—The agreement must be "in writing" and duly signed and filed with the clerk: *Davidson v. Head*, 18 C.L.T. 260.

As to form of agreement, see Form 192.

The agreement must be signed by the parties or their solicitor or agent, and filed with the clerk before the trial is entered upon: Rule 301. The agreement as given in the forms would not interfere with the right of either party to apply for a new trial, or to take any other proceeding which he would be entitled to take in an ordinary case.

The noting by the judge of the signing of the agreement is made *conclusive* evidence of the filing of the agreement. No appeal could, therefore, be entertained when such a note had been made by the judge.

Applies to Interpleader.—This section applies to interpleader proceedings: see section 161, sub-section 2.

Proceedings in case defendant does not appear.

123. If on the day named in the summons the defendant does not appear, or sufficiently excuse his absence, or if he neglects to answer, the Judge, on proof of due service of the summons and copy of the plaintiff's account, claim or demand, may proceed to the hearing or trial of the cause on the part of the plaintiff only, and the order, verdict or judgment thereupon shall be final and absolute, and as valid as if both parties had attended; and, except in tort or trespass, in case of the personal service of the summons and of detailed particulars of the plaintiff's claim, the Judge may, in his discretion, give judgment without further proof. R.S.O. 1877, c. 47, s. 82.

If He Neglects to Answer.—The defendant should make it a point to be at the court not later than the hour fixed for opening the sittings, for if proper service of the summons has been effected, the judge may proceed in his absence.

Final and Absolute.—The policy of the law is that there should be only one trial of a cause, and that a verdict or judgment should not be disturbed unless it clearly appears to be wrong: *Hooper v. Christoe*, 14 C.P. 121, *per Richards, C.J.*; *Arpin v. Regina*, 14 S.C.R. 736; *Hall v. Kennedy*, 8 A.R. 157; *White v. Smith*, 28 N.S.R. 5. But see *The North British & Mercantile Ins. Co. v. Tourville*, 25 S.C.R. 177, in which the court allowed an appeal on a mere question of fact against the concurrent findings of two courts on a sufficiently clear case being made out to the appellate court. The appellate court may draw inferences adverse to those of the trial judge from facts that are not really in dispute: *Booth v. Moffatt*, 11 Man. L.R. 25.

Where at the trial two of the defendants failed to press their defence and judgment was given against them, but not entered until judgment was finally given against a third defendant, their subsequent application to dismiss the action was refused by the judge, on the ground that the time allowed them for moving for a new trial commenced to run from the trial, and the Divisional Court held that there was no appeal: *Kinnard v. Towsley*, 27 O.R. 398.

See also cases cited in notes to sections 152 and 154.

If there was no provision for granting new trials in the Division Courts, no power would exist in such courts to do so: *R. v. Doty*, 13 U.C.R. 398; *G. N. Ry. Co. v. Mossop*, 17 C.B. 138, *per Jervis, C.J.*

In Case of Personal Service.—Judgment can only be entered by default on "personal service" being made.

Where the summons has not been personally served on a claim for less than \$15 under section 103 the plaintiff must prove his claim.

The plaintiff must also prove his claim in actions for "tort or trespass" and in all actions in which "detailed particulars of the plaintiff's claim have not been served."

It is provided that in other cases the judge may "in his discretion" give judgment without further proof. The usual practice is to exercise the discretion.

As to judgment against several defendants: see Rule 116.

As to judgment on counterclaim where plaintiff fails to appear at the trial: see Rule 113.

124. In case the Judge thinks it conducive to the ends of justice, he may adjourn the hearing of any cause in order to permit either party to summon witnesses or to produce further proof, or to serve or give any notice necessary to enable the party to enter more fully into his case or defence, or for any other cause which the Judge thinks reasonable, upon such conditions as to the payment of costs and admission of evidence or other equitable terms, as to him seems just. R.S.O. 1887, c. 51, s. 118.

Judge may adjourn hearing of cause.

May Adjourn the Hearing.—The judge has a wide discretion under this section and Rules 250 and 281. It should not be exercised except when a refusal to adjourn would work an injustice. If the power of adjournment had not been conferred by statute, it is doubtful if it could be exercised: *R. v. Murray*, 27 U.C.R. 134; *R. v. G.W. Ry. Co.*, 32 U.C.R. 506; *Forbes v. Michigan Central Ry. Co.*, 20 A.R. 584.

Postponing Trial.—It is submitted that less is required for postponing a trial in the Division Court than at *Nisi Prius*. The parties cannot always anticipate, without pleadings or discovery, all the evidence that may be required, and the section gives the judge full power to adjourn for further proof or to enable the parties to serve such notices to admit or produce, or other notices, as will cause *all* the facts to be fully brought out. The object is that complete justice may be done: Rule 250. No order need be served, unless by direction of the judge: Rule 280. When neither of the parties has appeared at the trial, they must be notified by the clerk, by postal card, of the adjournment and of the date of the sittings to which the adjournment has been made: Rule 286.

A trial will not be postponed at *Nisi Prius* until after the trial of an indictment for perjury, in a matter relating to the cause: *Johnston v. Wardle*, 3 Dowl. 550.

A trial was put off because a material witness was prevented from attending by fraud of the opposite party: *Turquand v. Dawson*, 1 C.M. & R. 709.

Other Equitable Terms.—Where the defendants applied to postpone the trial, and their defence was of a doubtful character, and they might have examined a witness, who was ill, *de bene esse*, the court refused the postponement, except on condition that \$1200 be paid into court: *Bank of Hamilton v. Stark*, 13 P.R. 213. It is not unusual to require the party applying to admit some matters of formal proof: *Brown v. Murray*, 4 D. & R. 830; and whatever terms the judge thinks just may be imposed. His discretion in this respect should be exercised reasonably and not capriciously: see notes to section 174.

If a person allows a witness to leave the country, knowing that his evidence is material, a postponement may be refused: *Solomon v. Howard*, 12 C.B. 463. A judge has a discretion in refusing the postponement of a case, notwithstanding the absence of a witness: *Turner v. Meryweather*, 7 C.B. 251. A trial will not be postponed where a witness is in defendant's employ and he has neglected to subpoena him in time and allowed him to leave: *Wright v. M'Guille*, 4 C.B.N.S. 441. Unless an endeavor has been made to procure the attendance of a witness, a postponement will be refused: *Ward v. Wilkinson*, 2 F. & F. 173; or if it appears that no application has been made to the witness to know if he will attend: *Worsley v. Bisset*, 3 Dougl. 58. If a witness is kept out of the way by plaintiff a trial will be postponed on application of defendant: *Duberly v. Gunning*, Peake, 97. If witness is out of the country, and it does not appear that there is a likelihood of his returning, the postponement will be refused: *R. v. D'Eon*, 1 W. Bl. 515. Sometimes the application will be refused if the party applying has conducted himself unfairly, or has been the cause of any improper delay: *Saunders v. Pitman*, 1 B. & P. 33. The illness of defendant's attorney was held a good cause for postponing a trial: *Hayley v. Grant*, Sayer, 63; but not where counsel was unprepared: *Colebrooke v. Dobbs*, 3 Burr, 1319. A party should apply at once (see Rule 250) otherwise he might have to pay the costs of the opposite party in preparing for trial: see *Dale v. Heald*, 1 C. & K. 314; *Ward v. Ducker*, 5 M. & G. 377. The party obtaining an adjournment on payment of costs should take means at once to have costs taxed: *Waller v. Joy*, 16 M. & W. 60; *Brega v. Hodgson*, 4 P.R. 47; but he may abandon the order without being liable for other than costs of the application: *Allen v. Mathers*, 9 P.R. 477. When application is made on the ground of the absence of a witness, it is not enough to show that the witness is material, and may and probably will give important evidence, or to swear that his evidence will be material and necessary, without showing that it will assist the case of the person making the application: *Kerr v. The G.T.Ry. Co.*, 4 P.R. 303. In *Spears v. The G.W.Ry. Co.*, 6 P.R. 170, it was held, in an action for personal injury, that the inability properly to calculate the damages to the plaintiff, owing to sufficient time not having elapsed from the receipt of the injury was a sufficient ground for postponing the trial: see *Fraser v. London Street Ry. Co.*, 29 O.R. 411; 26 A.R. 383. The judge may, under this section, *adjourn the hearing of a cause* from the regular sitting of the court to his chambers, within the territorial limits of the division; and such adjournment of the hearing of the cause is in effect, if not objected to by the parties, *an adjournment of the court to hear that cause*:—*Re Burrowes*, 18 C.P. 493; see also notes to section 71, *ante* p. 61.

An application to postpone the trial on the ground of the absence of a material witness is usually granted when the application appears reasonable: *Stevens v. Esling*, 2 F. & F. 136.

Where the defendant swore he was a necessary and material witness on his own behalf, and that it would be unsafe in his state of health to

travel from Ottawa to Winnipeg, it was held that the trial should not have been proceeded with in his absence: *Schultz v. Wood*, 6 S.C.R. 585; but the party applying must show due diligence or the application may be refused: *Steurt v. Gladstone*, 7 Ch. D. 394; or he may be ordered to pay the costs of it: *McDonald v. McMillan*, 22 Gr. 362; but where due diligence has been had, the costs will be made costs in the cause: *Brown v. Porter*, *Knox v. Porter*, 11 P.R. 250. See *Lydall v. Martinson*, 5 Ch. D. 780. As to application to postpone the trial before the hearing, see Rule 281.

Costs.—When the adjournment is applied for to suit parties, the party applying may be ordered to pay all costs that have been incurred by the case being on the list: *Lydall v. Martinson*, 5 Ch.D. 780. When a party has made diligent attempts to obtain a witness, costs should be in the cause: *Knox v. Porter*, 11 P.R. 250. Security may be ordered for the whole or part of claim: *Bank of Hamilton v. Stark*, 13 P.R. 213; but application must be promptly made: *McMillan v. McDonald*, 22 Gr. 362. Where a trial is postponed without costs, and a settlement is afterwards arrived at, it is beyond the power of the judge to amend his order by ordering payment of costs: *Noonan v. Bank of B.N.A.* 10 C.L.T. 93. See also *Steurt v. Gladstone*, 7 Ch.D. 394, and other cases cited *supra*.

Order.—The order need not be served, except by direction of the judge: Rule 280. See notes to section 125.

Abandoning Order.—Where an order was made for the postponement of a trial on payment of costs, it was held that the defendant was at liberty to abandon it without being liable for other than the costs of the application: *Allen v. Mathers*, 9 P.R. 477.

125. Where an action is being tried by a jury, the Judge, if he thinks it expedient for the interest of justice, may postpone or adjourn the trial for such time and upon such terms, if any, as he shall think fit. R.S.O. 1887, c. 51, s 119.

Postpone-
ment of
jury trial.

Adjourn the Trial.—It was evidently intended to remove any doubt as to the power of the judge, in cases where a jury is summoned, to adjourn the trial and to impose on a party applying for adjournment the payment of the fees of jurymen who may be required to return on another day: see *R. v. Hart*, 45 U.C.R. 1.

A judge may "consider it expedient for the interests of justice" that the trial of a cause should be postponed; yet not be willing to consider it just to impose on the taxpayers of a county the payment of jury fees in such a case; see section 176; and by this section, it is submitted, he is empowered to impose the payment of such fees, as well as other costs, on the party making the application.

A party in whose favor the postponement is granted, having acted upon it, or taken advantage of its provisions, is bound by its terms and cannot repudiate any part of it: *Griffin v. Dickenson*, 7 Dowl. 860; *Giraud v. Austen*, 1 Dowl. N.S. 703; *King v. Simmonds*, 7 Q.B. 289; *McKenzie v. Stewart*, 10 U.C.R. 634.

that if a party obtained a postponement on payment of costs, he would, unless he abandoned the order, be bound to pay them for he could not take the benefit of the order without its burthen: *Richardson v. Shaw*, 6 P.R. 236; see also *Martin v. McCharles*, 25 U.C.R. 279.

The words "upon payment of costs" are words of agreement, not mere words of condition, and execution may be issued upon an order in these words: *Stuart v. Branton*, 9 P.R. 566.

A judge could open again an order for adjournment granted by himself, or even rescind it before it was acted on, upon his discovering that he had made it inadvertently, or had been surprised into making it by any perversion or concealment of facts, or from the misconception on his part of the law or facts: *Shaw v. Nickerson*; *Gillespie v. Nickerson*, 7 U.C.R. 541; *Hughes v. Field*, 9 P.R. 127. But after an order has been made and acted upon the judge cannot make an order varying it: *Noonan v. Bank of B.N.A.*, 10 C.L.T. 93.

So long as an order stands unreversed it will be assumed that neither party is dissatisfied with it: *Hall v. Brown*, 3 P.R. 293.

Should there be any objection to the mode of complying with the order application should be made to the judge who made it for correction: *Ross v. Grange*, 4 P.R. 180.

If the order does not prescribe when the fees and costs are to be paid the party would have fifteen days from the rendering of the decision in which to pay: Rule 125.

Where consent is given to the making of an order, such consent cannot be arbitrarily withdrawn: *Harvey v. Croydon Union Rural Sanitary Authority*; 26 Ch. D. 249.

See also notes to section 124.

Abatement.—In case owing to any cause a sitting of the court is not held on the day appointed, and the court is not adjourned, then, unless the judge shall otherwise order, no matter or action which should have been tried or heard at such sitting, shall abate or be discontinued, but the same shall be considered to have been adjourned to the next sitting of the same court, and shall at such sitting be entered upon the judge's list of causes for trial: Rule 253.

Without this rule the action would be at an end: *Forbes v. Michigan Central Ry. Co.*, 20 A.R. 584.

All persons
empowered
to act as
agents or
advocates.

126. Any person may appear at the trial or hearing of any cause, matter or proceeding as agent and advocate for any party to any such cause, matter or proceeding in the Division Courts, except where prohibited under the next section. R.S.O. 1887, c. 51, s. 120.

Any Person May Appear.—The words any person are wide enough to include the case of a woman appearing on behalf of another person: R.S.O. c. 1, s. 8, (13); *Duck v. Bates*, 12 Q.B.D. 79; *Stroud*, 37; see *Beresford-Hope v. Sandhurst*, 23 Q.B.D. 79. But the judge cannot direct a counsel fee to be taxed in contested cases under section 214, and Rule 289, unless such agent is a barrister or solicitor: Rule 288. A mandamus will lie to compel a judge to hear an agent, unless he be a person whom the judge has rightly excluded under section 127: *R. v. Assessment Com. of St. Mary Abbots Kensington*, (1891) 1 Q.B. 373. On this subject see *Cobbett v. Hudson*, 15 Q.B. 988; notes to section 120 *ante* p. 208; see also *Lord v. Hall*, 8 C.B. 627; *Lindus v. Blackwell*, 5 C.B. 583; *Cotes v. Davis*, 1 Camp. 485. A party may appear in his own behalf and be a witness in the cause too: *Cobbett v. Hudson*, 1 E. & B. 11; *Davis v. Canada Farmer's Mutual Ins. Co.* 39 U.C.R. 452; but a plaintiff or defendant will not be heard in his own case after counsel has addressed the court: *Newton v. Chaplin*, 10 C.B. 356; and a barrister is in no better position than any one else: *Ib.*

Where defendants appear at the trial by different counsel it is a matter for the discretion of the judge, to be exercised under all the circumstances of the case, whether more than one ought to be allowed to address the jury: *Nicholson v. Brooke*, 2 Ex. 213; or to cross-examine a witness: *Walker v. McMillan*, 6 S.C.R. 241.

An advocate can act as such in a cause and as a witness as well: *Davis v. Canada M. F. Ins. Co.*, 39 U.C.R. 452, but see remarks as to impropriety of such a course: *Id.*

An agent or solicitor retained for the conduct of an action has not implied authority, after judgment in favor of his client, to enter into an agreement on his behalf to postpone execution: *Lovegrove v. White*, L.R. 6 C.P. 440; see *Butler v. Knight*, L.R. 2 Ex. 112. A counsel or solicitor, generally speaking, have authority to bind a client: *Strauss v. Francis*, L.R. 1 Q.B. 379; *Wilson v. Corp. of Huron and Bruce*, 11 C.P. 458; *Brown v. Blackwell*, 26 C.P. 43; *Moody v. Tyrrell*, 6 P.R. 314; *Matthews v. Munster*, 20 Q.B.D. 141; *Vardon v. Vardon*, 6 O.R. 736; *McDonald v. Field*, 12 P.R. 213; *Armour v. Kilmer*, 28 O.R. 618; *Lewis v. Lewis*, 45 Ch. D. 281; *Huddersfield v. Lister*, (1895) 2 Ch. 273; *Wilding v. Sanderson*, (1897) 2 Ch. 534; see however *Watt v. Clark*, 12 P.R. 359; *Stokes v. Latham*, 4 T.L.R. 305; *Sample v. McLaughlin*, 17 O.R. 490.

Quere.—As to right of an agent who is not a solicitor to recover his fees and expenses from those for whom he acts: see *Verlander v. Eddolls*, 45 L.T. 543; *Irvin v. Sayer*, 58 L.J.Q.B. 64; *Fowler v. Monmouthshire Ry. Co.*, 4 Q.B.D. 334.

127. The Judge or acting Judge may, wherever in his opinion justice appears to require it, prevent any person from appearing at the trial or hearing of any cause, matter or proceeding in the Court, as agent and advocate for any party or parties to any such cause, matter or proceeding. R.S.O. 1887, c. 51, s. 121.

Judge may prevent any one from acting as agent or advocate in certain cases.

It is submitted that under this section a judge could even refuse to allow a barrister or solicitor to appear in a Division Court case as "agent or advocate:" *R. v. Marylebone, C.C.*, 34 Sol. Jour. 459. The power is not given to prohibit generally but a particular person, at the trial or hearing of *any cause, matter or proceeding*.

As to misconduct on the part of any one appearing in the court, see section 283, and notes to section 55.

Tender or Payment of Money into Court.

128. If the defendant in an action of debt or contract brought against him in a Division Court, desires to plead a tender before action brought, of a sum of money in full satisfaction of the plaintiff's claim, he may do so on filing his plea with the Clerk of the Court before which he is summoned to appear, at least six days before the day appointed for the trial of the cause, and at the same time paying into Court the amount of the money mentioned in the plea: and notice of the plea and payment shall be forthwith communicated by the Clerk of the Court to the plaintiff by post (on receiving the necessary postage), or by sending the same to his usual place of abode or business. R.S.O. 1887, c. 51, s. 122.

Plea of tender with payment of money into Court.

Debt or Contract.—This section does not apply to actions of tort, but to actions in "debt or contract" only. A plea of tender is only applicable

where the party pleading has been guilty of no breach of contract: *Hume v. Peplow*, 8 East, 168, 170. Therefore, where a debt is payable on a day certain, as on an acceptance, the plea is inapplicable: *Poole v. Tunbridge*, 2 M. & W. 223. It cannot be pleaded to an action for unliquidated damages: *Davys v. Richardson*, 20 Q.B.D. 722; S.C. 21 Q.B.D. 202. See *Wheeler v. United Telephone Co.*, 13 Q.B.D. 597, at p. 603.

Tender.—"The principle of a plea of tender is this, that the defendant has always been ready at all times to pay upon request, and on a particular occasion offered the money:" *Hesketh v. Fawcett*, 11 M. & W. 356. "It is a performance of the contract on the part of the defendant so far as he could perform it, and was not prevented by the plaintiff:" *Bullen & Leake*, 3rd Ed. 693. A plea of tender, like a plea of payment into court, operates as an admission of the special contract stated in the claim to which it is pleaded: *Cox v. Brain*, 3 Taunt. 95; *Hudon Cotton Co. v. Canada Shipping Co.*, 13 S.C.R. 401; see *Hennell v. Davies*, (1893) 1 Q.B. 167; *Dumbleton v. Williams*, 76 L.T. 81. It supersedes the necessity of showing that a guarantee was in writing: *Middleton v. Brewer*, Peake 15. Where a note is payable on demand a tender at any time before action is good: *Norton v. Ellam*, 2 M. & W. 461.

By Whom Tender Must be Made.—The tender need not be made by the debtor himself; it is sufficient if made by his agent or servant, and a tender made by an agent at his own risk of more money than is given to him is good: *Reed v. Goldring*, 2 M. & S. 86.

To Whom a Tender Must be Made.—A tender to a person authorized to receive payment is sufficient: *Goodland v. Blewitt*, 1 Camp. 477; *Kirton v. Braithwaite*, 1 M. & W. 310. So a tender to a managing clerk though he had received orders not to accept it: *Moffat v. Parsons*, 5 Taunt. 307. So if he refuse, saying he had no instructions: *Finch v. Boning*, 4 C.P.D. 143, *per Coleridge, C.J.*

Where a solicitor sends a letter to demand, and the debtor makes a tender to him, it is a good tender, unless the solicitor disclaims his authority at the time; and if the solicitor is absent, a tender to a clerk at his office is sufficient: *Wilmot v. Smith*, 3 C. & P. 453; *Kirton v. Braithwaite*, 1 M. & W. 310. But without any previous demand a tender to the managing clerk of the plaintiff's solicitor, who disclaims authority to receive it, is not sufficient: *Bingham v. Allport*, 1 N. & M. 398; *Watson v. Hetherington*, 1 C. & K. 36. A tender to the solicitor of the plaintiff, so long as he remains such, is good: *Crozer v. Pilling*, 4 B. & C. 26; *Moody v. Tyrrell*, 6 P.R. 314. So also a tender if made to a person in the office of plaintiff's solicitor to whom defendant was referred by a clerk in the office, and who refused the tender only as being too little, without showing who that person was: *Wilmot v. Smith*, *supra*. A tender to a person in a merchant's place of business, who appeared to be conducting it, is good, though in fact not intrusted to receive money: *Barrett v. Deere*, M. & M. 200. It is otherwise where payment is not connected with plaintiff's business, but quite collateral to it: *Sanderson v. Bell*, 2 C. & M. 304. Where money was brought to plaintiff's house, and delivered to his servant, who appeared to go with it to his master, and returned saying his master would not take it, it was held to be evidence from which a tender might be inferred: *Anon.*, 1 Esp. 349. A tender of a partnership debt to one of several partners is good: *Douglas v. Patrick*, 3 T.R. 683. If a man is indebted to several persons in different sums, and when they are all together, tenders them one gross sum sufficient to satisfy all their demands, which they refuse to receive, insisting on more being due, this is a good tender: *Black v. Smith*, Peake, 88. But where a party has separate demands for unequal sums against several persons, an offer of one sum, for the debts of all, will not support

the defence that a certain portion of this sum was tendered for the debt of one: *Strong v. Harvey*, 3 Bing. 304. A tender to an executor may be good, though he has not proved the will, provided he afterwards proves the will and takes upon himself the burthen of administration: *Add. on Con.*, 154.

A tender of part of one entire debt is inoperative: *Dixon v. Clarke*, 5 C.B. 365; and a debtor cannot apply a set-off in reduction of the amount due so as to make a tender of the balance good: *Searles v. Sadgrave*, 5 E. & B. 639.

Mode of Making.—A tender to be strictly legal, should be made in legal coin: *Polglass v. Oliver*, 2 C. & J. 15. Up to \$10 it may be made in silver; and to 25c. in copper: *R.S.C. c. 30*, section 5. Bank notes are a good tender if not objected to: *Wright v. Reid*, 3 T.R. 554; *Tiley v. Courtier*, 2 C. & J. 16, note (c).

A tender made in the form of a cheque in a letter is good when no objection is made to the quality, but the quantity of the tender, and if the letter contain a request for a receipt to be sent back, it does not vitiate the tender, it not being a condition: *Saunders v. Graham*, Gow. 111; *Jones v. Arthur*, 8 Dowl. 442; see *Blumberg v. Life Interests Cor.*, 75. L.T. 627.

An offer of money by a debtor to a creditor, and a request by the latter for a day's delay before receiving it, on account of an accident, are not a tender and a refusal of the money, and do not discharge the debtor: *Jenkyns v. Brown*, 14 Q.B. 503.

Production of the Money.—There must be production of the money, or that dispensed with by the express declaration or equivalent act of the creditor: *Thomas v. Evans*, 10 East. 101; *Polglass v. Oliver*, 2 C. & J. 17; *Dickinson v. Shee*, 4 Esp. 68; *Matheson v. Kelly*, 24 C.P. 598. A tender is not good where the money is not in sight, but the witness supposed it was in a desk and did not see it produced so that it did not appear that if the party was willing to accept the money, it could at once be paid; the money should be at hand and capable of immediate delivery: *Glasscott v. Day*, 5 Esp. 48. But where more is claimed to be due, it is not necessary to produce the money tendered: *Black v. Smith, Peake*, 88. Where the facts were found to be that the defendant's attorney called on the plaintiff and said, "I come to pay you £1 12s. 5d. which the defendant owes you," that the attorney put his hand in his pocket, but did not produce the money, the plaintiff said, "I cannot take it, the matter is now in the hands of my attorney," held, not a sufficient tender: *Finch v. Brook*, 1 Bing. N.C. 253. A tender made with the money twisted up in bank notes in the person's hand, he stating how much, and not shown to the party, is good: *Alexander v. Brown*, 1 C. & P. 288. If the plaintiff says he can't take the money, when an offer is made to go upstairs and fetch it, such offer is a good tender: *Harding v. Davies*, 2 C. & P. 77; but if it did not appear that the person tendering had the money upstairs, it might not be: *Kraus v. Arnold*, 7 Moore, 59. In this case, where the defendant ordered A. to pay the plaintiff £7 12s. 0d., and the clerk of the plaintiff's attorney demanded £8, on which A. said he was only ordered to pay £7 12s. 0d. which sum was in the hands of B., and B. put his hand to his pocket with a view of pulling out his pocket-book to pay £7 12s. 0d. but did not do so, by the desire of A., but B. could not say whether he had that sum about him, but swore that he had it in his house, at the door of which he was standing at the time, held that this was not a legal tender, as the money should have been produced to the attorney's clerk: but see *Long v. Long*, 17 Gr. 251. Where a vendor admits a tender would be fruitless, it is unnecessary: *Jackson v. Jacob*, 3 Bing. N.C. 869. If a party tells his creditor that he will pay him so much, and puts his hand in his pocket to take out the money, but before

he can get it out the creditor leaves the room, and the money is not produced till he is gone, it is no tender: *Leatherdale v. Sweepstone*, 3 C. & P. 342; *Matheson v. Kelly*, 24 C.P. 598; see *Howell v. Listowel Rink Co.* 13 O.R. 476. Where the plaintiff disputes the *quantum* to prove a tender, some money must be proved to have been produced, though it is not necessary to prove the exact sum: *Dickinson v. Shee*, 4 Esp. 68. A trader who, under a trader debtor summons, had signed an admission of debt, went to his creditor with the amount of it in his pocket in money, and told the creditor that he had come to pay that amount, the creditor said it was of no use, as it was too late, and that the debtor must see the creditor's solicitor; it was held that the production of the money was dispensed with, and that the tender was good: *Ex parte Danks*, 2 De G. M. & G. 936; see also *Reynolds v. Allan*, 10 U.C.R. 350; *Western Ass'ee Co. v. McLean*, 29 U.C.R. 57. Where, on tendering payment of money due upon a mortgage, a receipt was required, and the plaintiff did not object on that ground, but gave a different reason for refusing the money, held a good tender: *Lockridge v. Lacey*, 30 U.C.R. 494; see also *Llado v. Morgan*, 23 C.P. 517.

Requiring Change.—A plea of tender of £20 is supported by evidence of the tender of a larger sum, though such larger sum was tendered as the sum which the creditor was to receive and not as the sum out of which he was to take the £20: *Dean v. James*, 4 B. & Ad. 547; but a tender of a larger sum, requiring change, is not a good tender of a smaller sum: *Robinson v. Cooke*, 6 Taunt. 336; *Betterbee v. Davis*, 3 Camp. 70. A tender of £2, to pay £1 13s. 6d., is good, if the plaintiff objects to receive it only because he is entitled to a larger sum, and not on the ground that he has no change: *Cadman v. Lubbock*, 5 D. & R. 289. A tender of part of the claim, and a counterclaim for more than the full amount of the debt, is not a good tender: *Brady v. Jones*, 2 D. & R. 305; and see *Holland v. Phillips*, 6 Esp. 46. The defendant owed £108, demanded by the attorney for his creditor; he sent a man, who laid down on the desk one hundred and fifty sovereigns, out of which he desired the attorney to take the principal and interest, but the attorney refused to do so, unless a shop account due from plaintiff to defendant was fixed at a certain amount. Held a good tender of the £108: *Bevans v. Rees*, 5 M. & W. 306; see also *Gretton v. Mees*, 7 Ch. D. 839.

Demand of a Receipt.—Going with money in hand to make a tender, and demanding whether the creditor has a receipt stamp, and receiving an answer in the negative, but not offering the money, was held not a tender: *Ryder v. Townsend*, 7 D. & R. 119. A tender is not good if accompanied by a demand for a receipt in full of all demands: *Griffith v. Hodges*, 1 C. & P. 419; or where a receipt was demanded that the sum tendered was the balance due: *Higham v. Baddely*, Gow 213. But if the creditor refuse to receive the money on account of more being due, he cannot afterwards object that a receipt was demanded: *Richardson v. Jackson*, 8 M. & W. 298. Where the words of a tender were, "I offer you £7 16s. 8d. as the balance of £35, and request a receipt in full," it was held invalid as being conditional: *Foord v. Noll*, 2 Dowl. N.S. 617. A tender of a quarter's rent, coupled with a demand of a receipt to a particular day, the contest between the parties being whether one or two quarters' rent was due, is not a valid tender: *Finch v. Miller*, 5 C.B. 428; but the demand of a receipt simply for the amount of money tendered does not invalidate the tender: *Lockridge v. Lacey*, 30 U.C.R. 494.

In *Black v. Allan*, 17 C.P. 248, *Richards, C.J.*, said: "As to tender, the later cases seem to lay it down where there is anything equivocal in the conduct of the party to whom the tender is made, it is a question of fact for the jury to decide whether the tender be absolute or conditional,

and whether the party dispenses with the production of the money or not." See also *Tobey v. Wilson*, 43 U.C.R. 230.

Under Protest.—A tender of the full amount demanded under protest is good: *Manning v. Lunn*, 2 C. & K. 13; *Scott v. Uxbridge & Rickmansworth Ry. Co. L.R.* 1 C.P. 596; *Sweny v. Smith*, L.R. 7 Eq. 324; *Thorpe v. Burgess*, 8 Dowl. 602; *Greenwood v. Sutcliffe*, (1892) 1 Ch. 1.

Demand Prior or Subsequent to Tender.—The substance of the defence being that the defendant was "always ready and willing" to pay the debt, the defence will be defeated by showing a demand and refusal prior or subsequent to the tender: *Bennett v. Parker, Jr.*, 2 C.L. 89; *Poole v. Tambridge*, 2 M. & W. 223, 226. 1 Wms. Saund. 33 c. (2). The onus of proving the subsequent demand is on the creditor, and if for more than the precise sum tendered it will be bad: *Spybey v. Hide*, 1 Camp. 181; *Rivers v. Griffiths*, 5 B. & Ald. 630. And it must be by some one authorized to receive it and grant a discharge: *Coore v. Callaway*, 1 Esp. 115; even in replevin: *Pim v. Grevill*, 6 Esp. 95. A subsequent demand on one of two joint debtors is sufficient: *Peirse v. Bowles*, 1 Stark. 323. A letter sent by the plaintiff and received by the defendant, demanding the sum tendered is not sufficient evidence of subsequent demand; for at the time of the demand the defendant should have an opportunity of immediately paying the sum demanded: *Edwards v. Yeates*, Ry. & M. 360. But it was held in *Hayward v. Hague*, 4 Esp. 93, that a letter demanding a debt sent to defendant's house, to which answer was made that it would be settled, was held sufficient evidence of a demand on the issue of subsequent demand and refusal to a plea of tender. The subsequent adoption of a demand is not sufficient: *Story on Agency*, § 247.

A proper tender will stop the running of interest if the mortgagor keeps the money ready to pay off the mortgagee: *Gyles v. Hall*, 2 P. Wms. 377.

The refusal of a tender is not such a breach of contract as will support an action: *Bank of New South Wales v. O'Connor*, 14 App. Cas. 273, 284.

A plaintiff can be nonsuited after a plea of tender, if he does not appear, and in such a case it is the proper course: *Anderson v. Shaw*, 3 Bing. 290.

Notice.—A plea of tender will be deemed a sufficient notice of disputing the plaintiff's claim, within the meaning of section 113: Rule 104.

Notice of the plea and of payment into court must at once be given by the clerk (on receiving the necessary postage) to the plaintiff: Rule 171. The notice may be mailed to the plaintiff's address or sent to his usual place of abode or business: *Ib.* For form of notice: see Form 195.

Payment Out of Court.—The money paid into court remains there until after the judgment: Rule 170; see section 130, and notes thereto.

In Actions of Detinue.—In an action of detinue the defendant may, with a tender of the subject of the action for the detention of which the action is brought, pay money into court as compensation for damages for the detention thereof, and for injury caused thereto, or either or both, with costs of the action: Rule 246.

Where the defendant is desirous of paying money into court pursuant to the rule the practice respecting the same shall, in all respects, be regulated by that under which a defendant may pay money into court in other actions as provided by the Act and Rules: Rule 246 (a).

The practice in replevin prescribed by Rules 61 and 62 is thus extended to the action of detinue.

In an action of detinue the plaintiff is entitled to a judgment that the defendant do deliver to the plaintiff the property in question in the action forthwith, and also that the defendant shall pay to the plaintiff the value of the goods in case the same are not returned, and also damages and costs, and the plaintiff is entitled to an execution (Form 161) for the recovery of the goods. For form of judgment: see Form 128. The value of the goods must be ascertained and stated in the judgment: *Phillips v. Jones*, 15 Q.B. 859.

Prior to the enactment of this rule, in actions of detinue for goods, if all or any of the goods were delivered up after action brought, the plaintiff could not have judgment to recover the goods so delivered, or their value, but might have judgment to recover damages for their detention, if he had sustained any damage, and judgment to recover the residue of the goods and their value, and damages for their detention: *Cressfield v. Such*, 8 Ex. 159; *Leider v. Rhys*, 10 C.B.N.S. 369; and a plea averring the delivery of the goods to the plaintiff and his acceptance thereof, and payment into court of one shilling damages, was held good: *Cressfield v. Such*, 8 Ex. 159.

This rule enables the defendant to defeat the action by a mere tender of the goods without acceptance thereof, and payment of the damages into court. The defendant must pay a sufficient sum to cover the damages into court, and also the costs to date and postage, upon notice to plaintiff thereof: sections 131 and 132; Rule 171. If the plaintiff then recovers no further sum in the action than the sum paid into court, he is liable for the costs incurred after such payment. The money cannot be paid out to the plaintiff before trial unless he accepts it in satisfaction. Any costs which are awarded to the defendant are deductible therefrom, and payable to the defendant: see Rule 170.

Tender of the Subject of the Action.—The rule does not prescribe in what manner the tender is to be made. It is submitted that the tender should be made to the plaintiff personally, or to some person authorized to receive possession of the goods for him. It is submitted that it is not sufficient for the defendant merely to embody an offer to return the goods in his plea of payment into court. No right is given to the defendant to tender a portion of the goods. If a portion is tendered and accepted, of course the plaintiff's right to a judgment for their recovery or their value is at an end; but in the absence of the acceptance by him of any portion of the goods, the whole must be tendered in order to form, with the payment into court, a good defence.

Practice.—The sections of the Act relating to payment into court in any other actions are sections 131, 132 and 133. The rules are 170, 171, 244, and 245.

Amount
tendered to
be paid to
plaintiff,
etc.

129. The said money shall be paid to the plaintiff, less \$1 to be paid over to the defendant for his trouble, in case the plaintiff does not further prosecute his action; and all proceedings in the action shall be stayed unless the plaintiff, within three days after the receipt of notice of the payment, signifies in writing to the Clerk of the Court his intention to proceed for his demand, notwithstanding such plea; and in such case the action shall proceed accordingly. R.S.O. 1887, c. 51, s. 123.

Shall be Stayed.—The defendant is permitted to file his plea and pay the amount into court, and the plaintiff has three days, exclusive of the

day, on which he receives the notice (see notes to section 113) to determine whether he will accept or not.

Notwithstanding Rule 241 (which if it has application to this case, only applies to the duty of the clerk), it is submitted, that the time does not commence to run against the plaintiff until the actual receipt of the notice: *McCrea v. Waterloo M. F. Ins. Co.*, 26 C.P. p. 438, *per* Galt, J.; *A.R.* 231; *McCann v. Waterloo M. F. Ins. Co.*, 34 U.C.R. 376. If he rejects the payment, the case is to be tried at the next sitting of the court after the receipt by the clerk of the notice of such rejection, but on application to him, at any time, the judge may further postpone the trial. Rule 244.

The delay not being by the act of the court or its officers it is submitted that the notice could not be given, nor allowed to be given, *non pro tunc*: *Lanman v. Audley*, 2 M. & W. 535; *Freeman v. Tranah*, 12 C.B. 406; *Moor v. Roberts*, 3 C.B.N.S. 845, *per* Williams, J. Where a stay of proceedings was "until the further order of the court," it was held that neither party could abandon the order, because each party had an interest in it: *Wilson v. Upfil*, 5 C.B. 245. *Wilde, C.J.*, says, at page 246: "It continues to be a binding order until rescinded by the authority by which it was made."

A plaintiff cannot get money paid into court out, until the suit in which it is paid in is determined, unless the judge otherwise orders. This is governed by Rule 170: see *Griffiths v. School Board of Ystradygodydd*, 24 Q.B.D. 397.

See notes to sections 131 and 132, as to payment into court and the proceedings thereon.

Judge May Remove Such Stay.—When an action has been stayed under this section or under section 132, the judge has power, upon application made for that purpose by the plaintiff, explaining in a satisfactory manner his omission to signify his intention to proceed, and, after hearing the parties, to remove such stay and to allow the action to proceed, upon such terms as he shall deem just: Rule 245.

Formerly, upon the omission of the plaintiff to give notice in writing of his intention to proceed for the remainder of the claim, the action became at once stayed, and no power existed either to extend the time or remove the stay. A verbal notice was insufficient, and prohibition would have been ordered on any attempt to proceed in violation of the statutory stay of proceedings: *Re McGregor v. Norton*, 13 P.R. 223. The stay should be removed in all cases where the plaintiff has all along been desirous of proceeding and the omission to give notice explained and the application for its removal is promptly made.

If necessary, the judge may adjourn the hearing in order that the plaintiff may be able to comply with the practice: Rules 244 and 250.

130. If after such tender and payment into Court the plaintiff proceeds with his action and the decision thereon is for the defendant, the plaintiff shall pay the defendant his costs, charges and expenses, to be awarded by the Court, and the amount thereof may be paid over to the defendant out of the money so paid in with the said plea, or may be recovered from the plaintiff in the same manner as any other money payable under a judgment of the Court; but, if the decision be in favor of the plaintiff, the full amount of money paid into Court as aforesaid shall be applied to the satisfaction of

Rule as to costs where plaintiff proceeds for balance.

his claim, and a judgment may be pronounced against the defendant for the balance due and the costs of suit according to the usual practice of the Court in other cases. R.S.O. 1887, c. 51, s. 124.

After Such Tender and Payment Into Court.—These words were introduced in the revision of the statutes in 1897. The object of this amendment is not very clear, unless it is intended to emphasize the reference to the preceding sections implied in the words "the decision thereon," which, it would seem, refer only to the provisions of section 128 and the two following sections, and to distinguish them from the sections immediately following this one, which are applicable only to payment into court "in satisfaction for the plaintiff's demand."

Defendant's Costs, Charges and Expenses.—"This would include the defendant's expenses of attending on his own behalf, if he did so attend expressly for the purpose of giving evidence on his own behalf, and not to superintend the cause;" *Howes v. Barber*, 18 Q. B. 588; or such sum as the judge might think proper to order a defendant, though not a witness, under section 213. See *Fox v. Toronto & Nipissing Railway Co.*, 7 P. R. 157; and notes to section 213.

The judge has no discretion as to costs under this section; the statute arbitrarily determines how they shall be awarded if the decision be for defendant. But if it be in favor of the plaintiff, the money paid into court shall be applied to the satisfaction of his claim, and judgment may be given against the defendant for the balance due and the costs of the suit, according to the usual practice. See notes to sections 131 and 132.

Defendant
may pay
money into
Court.

131. The defendant may at any time, not less than six days before the day appointed for the trial, pay into Court such sum as he thinks a full satisfaction for the plaintiff's demand, together with the plaintiff's costs up to the time of such payment. R.S.O. 1887, c. 51, s. 125.

Not Less Than Six Days.—This means clear days: see notes to section 91, *ante* p. 149. If he do not pay into court at least six days "before the day appointed for trial," he cannot make the payment afterwards, though the trial may be adjourned: *Fletcher v. Baker*, L. R. 9 Q. B. 372. The provisions of Rule 250 could not be invoked for the purpose of enabling a defendant to comply with this section.

The word "defendant" must, in case of an action against two or more, be read "defendants:" Rule 2 (12); Interpretation Act, s. 8 (24).

The English County Court Rules require a defendant to pay money into court, if he desires to do so, at least five clear days before the "return day," and, where a summons was issued on the 14th March, returnable on 15th April, and on 8th April defendants paid money into court, it was held the payment was not too late: *Stevens v. Hounslow Burial Board*, 61 L.T. 839.

Care must be taken to pay into court enough to satisfy the full claim for damages and costs to the time of paying the money in. Interest, if allowable, must be calculated to the time of payment, and not merely to the issue of the summons: *Kidd v. Walker*, 2 B. & Ad. 705.

Where several matters are included in one suit, payment into court may be made to all: *Marshall v. Whiteside*, 1 M. & W. 188.

When pleaded to a cause of action which, in a higher court, before the Judicature Act, would have come under the head of indebitatus

counts, it admits "that the defendant is liable in respect of some one or more contracts or causes of action stated in the general counts, to the extent of the sum so paid in; and the plaintiff cannot apply that admission to any particular contract he may please to select any more than the defendant." Taylor on Evid., s. 761. It admits also the validity of every species of claim mentioned in the particulars, and that some damages are due on each: Edgar v. Watson, 1 C. & M. 494. It admits the character in which a plaintiff sues: Lipscombe v. Holmes, 2 Camp. 141, and his sole right to the money sued for: Walker v. Rawson, 5 C. & P. 486; and that the defendants are properly sued jointly: Ravenscroft v. Wise, 1 C. M. & R. 203. It also admits that the action is not brought too soon: Harrison v. Douglas, 3 A. & E. 396; but all such admissions only operate to the amount of the money paid into court: Archer v. English, 1 M. & G. 873. If paid in, on an action on a special count or claim, it admits the contract as charged: Israel v. Benjamin, 3 Camp. 40; McCance v. London and North-Western Ry. Co., 7 H. & N. 477, and that nominal damages are due on it: Archer v. English, 1 M. & G. 873; Hennell v. Davies, (1893) 1 Q.B. 367; see Coote v. Ford, (1899) 2 Ch. 93; and the defendant cannot be allowed to controvert it: Lloyd v. Watkey, 9 C. & P. 771. Still less will he be allowed to give evidence of facts under this plea, even in mitigation of damages, which, if pleaded before, would have been a bar to the action: Speck v. Phillips, 5 M. & W. 279. In an action for use and occupation, it admits plaintiff's sole title: Dolby v. Hies, 11 A. & E. 335. If paid in on a promissory note payable by instalments, it only admits the amount of instalments as due which the money paid in will cover, and does not preclude the Statute of Limitations being pleaded to the others: Reid v. Dickens, 5 B. & Ad. 399. And where there are several items in the amount claimed, it admits that there is some liability, but not that something is due on every item of the account: Stevenson v. Berwick Corporation, 1 Q.B. 154.

It is submitted that payment into court may be pleaded to part of the plaintiff's claim: Charles v. Branker, 12 M. & W. 743; Brune v. Thompson, 4 Q.B. 543. Where plaintiff sets out his cause of action in two ways, on either of which he can recover, it is enough to pay money into court on one: Early v. Bowman, 1 B. & Ad. 889; Stafford v. Clark, 2 Bing. 377. Payment into court in actions of tort has the same effect as in actions of contract. It admits a cause of action with damages amounting to the sum paid into court; but it does not necessarily admit the cause of action stated in the particulars: Schreger v. Carden, 11 C.B. 851; Robinson v. Harman, 1 Ex. 850; Story v. Finnis, 6 Ex. 123. If the claim is general and unspecific, although it admits a cause of action, it does not admit the cause of action sued for, and therefore the plaintiff must give evidence of that cause of action before he can recover larger damages than the sum paid into court: Perren v. The Monmouthshire Ry. and Canal Co., 11 C.B. 855. See the report of this case for a general view of the effect of payment into court in different forms of action. If pleaded as to part, and plaintiff fail on the rest, he must pay costs: Rumbelow v. Whalley, 16 Q.B. 397. A defence in denial of the cause of action will not be allowed with payment into court: Hart v. Denny, 1 H. & N. 609; Spurr v. Hall, 2 Q.B.D. 615; Berdan v. Greenwood, 3 Ex. D. 251. But, *quære*, and if the clerk receives the money with such a denial, the payment cannot be construed as an admission: Harper v. Davis, 19 Q.B.D. 170. If a person avails himself of payment into court, he cannot afterwards repudiate the effect of it: Crombie v. Davidson, 19 U.C.R. 369.

Under the provisions of Rule 170 money paid into court in a Division Court action under this section at once becomes the plaintiff's, but when he proceeds with the action it must remain in court until after judgment

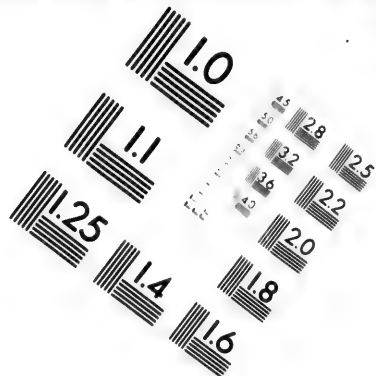
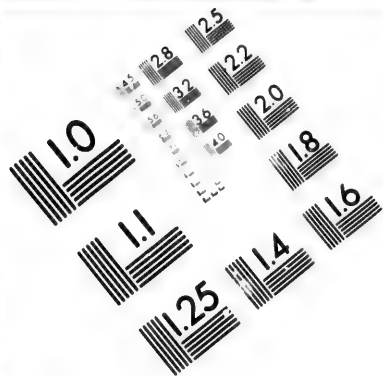
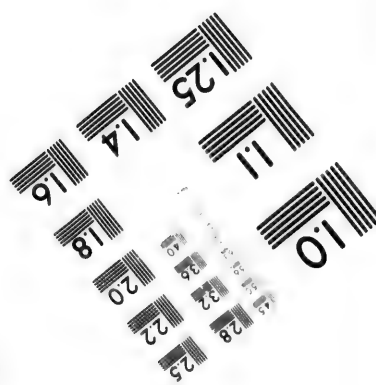
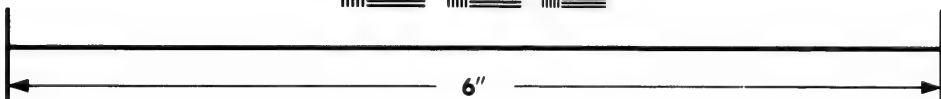
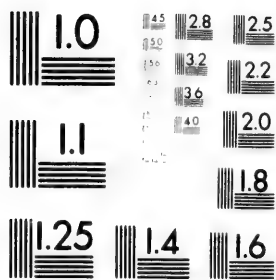


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is given, when any costs awarded the defendant, after payment in, must be deducted therefrom. Where, therefore, in an action for tort, the defendant paid a sum of money into court in alleged satisfaction of the plaintiff's claim and costs, the plaintiff proceeded with the action and judgment was given in defendant's favor, an order made by the Division Court judge directing the sum so paid in to be paid out to the defendant was set aside and the amount directed to be paid out to the plaintiff after deducting the costs awarded to the defendant: *Re O'Neil v. Hobbs*, 29 O.R. 487.

Where defendant paid \$300 into court in satisfaction of the plaintiff's demand and at the same time pleaded tender before action, and that he was now and had always been ready and willing to pay him that sum, it was held that the defence was so framed that the plaintiff, if he desired to take the money out of court, should by reason of C.R. 419 and 420, have elected to do so before replying or before the time for replying expired. As he did not do so the money should, in the absence of special circumstances, remain in court to be dealt with when the case was finally disposed of, and that on an appeal by the defendant the latter might contend that the amount recovered should be reduced below \$300, notwithstanding the payment into court: *Denison v. Woods*, 17 P.R. 549; followed in *Magann v. Ferguson*, 18 P.R. 201.

Payment into court operates as a notice of defence: Rule 104; and can be pleaded in an action of replevin: Rule 61; and also in an action of detinue: Rule 246.

And where in an action against an executor or administrator a defendant admits his representative character and that he is chargeable with a sum in respect of assets he shall pay such sum into court subject to the rules respecting payment into court in other cases: Rule 98. This rule is expressed in the imperative but it is not intended that a failure to pay into court shall render the defendant liable, except to execution in the ordinary way. Under the section the defendant is required to pay the costs to the time of making payment into court. If the executor should not comply with the rule he would not be allowed any additional costs on passing his accounts.

No written plea is necessary under this section as is required under section 128.

As to costs see section 133.

Clerk to
give notice
of payment
to plaintiff.

132. The Clerk having received the necessary postage, shall forthwith send notice of such payment to the plaintiff by post or otherwise to his usual place of abode or business, and the sum so paid shall be paid to the plaintiff, and all proceedings in the action stayed, unless within three days after the receipt of the notice the plaintiff signifies in writing to the Clerk his intention to proceed for the remainder of the demand claimed, in which case the action shall proceed as if brought originally for such remainder only. R.S.O. 1887, c. 51, s. 126.

Forthwith.—See notes to section 24, *ante* p. 19. The provisions of Rule 171 also provide for this notice. For form of notice, see Form 195. The notice must be sent by registered letter if sent by post: Rule 169; and must be in writing: section 97; Rule 240. It must show the place and time of trial: section 119.

Within Three Days.—See notes to section 129. Formerly the time could not be extended nor the stay of proceedings removed, and if the prescribed notice were not given with the time specified the trial could not be proceeded with afterwards: *McGregor v. Norton*, 13 P.R. 223; see *Magann v. Ferguson*, 18 P.R. 201; but the judge may now remove the stay and allow the action to proceed: Rule 245; notes to section 129, *ante* p. 223.

133. If the plaintiff recovers no further sum in the action than the sum paid into Court, the plaintiff shall pay the defendant all costs, charges and expenses incurred by him in the action after such payment, and such costs, charges and expenses shall be taxed, and may be recovered by the defendant by the same means as any other sum ordered to be paid by the Court. R.S.O. 1887, c. 51, s. 127.

Plaintiff to pay defendant's costs if no further sum recovered.

If the Plaintiff Recovers.—The word "recovers" as used here may, it is submitted, be read as "obtains judgment." The word "recovers" has a technical meaning in law whereby it signifies to recover by action, and by judgment of the court: *Wigens v. Cook*, 6 C.B.N.S. 784; *Ferguson v. Davison*, 8 Q.B.D. 470; *Stroud* 660. "But the amount of the verdict is not 'recovered' till judgment can be signed upon it:" *per Brett, J.*, *Ings v. London & S.W. Ry. Co.*, L.R. 4 C.P. 17. A plaintiff does not "recover" a sum of money paid in under a successful plea of tender: *James v. Vane*, 29 L.J.Q.B. 169; see *Baylis v. Lintott*, L.R. 8 C.P. 345; *Hewitt v. Cory*, L.R. 5 Q.B. 418; *Cowell v. The Amman Co.*, 6 B. & S. 333.

Set-off and Statutory Defences.

134. In case the defendant desires to avail himself of the law of set-off, or of the Statute of Limitations, or of any defence under any other statute in force in Ontario, he shall, at least six days before the trial or hearing, give notice thereof in writing to the plaintiff, or leave the same for him at his usual place of abode if within the division, or, if living without the division, shall deliver the same to the Clerk of the Court in which the action is to be tried; and in case of a set-off the particulars thereof shall be delivered to the Clerk and shall accompany the notice to be given as aforesaid to the plaintiff. R.S.O. 1887, c. 51, s. 128.

Defendant to give notice of set-off or other statutory defence.

Set-off, Counterclaim and Statutory Defences.—In case the defendant desires to avail himself of the law of set-off, counterclaim or of the Statute of Limitations or any other statutory defence provision is here made for it: Rule 115; *Skirving v. Ross*, 31 P. 423.

Statutory Defences.—The defence of want of notice under the Workman's Compensation for Injuries Act, s. 13, is a statutory defence: *Conroy v. Peacock*, (1897) 2 Q.B. 6; so also is the defence of the Statute of Frauds in an action on a contract for the sale of goods of the value of \$40: *Brutton v. Branson*, (1898) 1 Q.B. 219; and a defence of "no signed bill" in an action for a solicitor's bill of costs: *Lewis v. Burrell*, 77 L.T. 626; and also the defence of a bailiff of the Division Court under sections 293 and 296; *Denny v. Bennett*, 44 W.R. 333; as well as all other

cases in which the general issue by statute can be pleaded: see *Graham v. Newcastle (Mayor)*, (1893) 1 Q.B. 643; *Allwright v. Perks*, 9 T.L.R. 235; *Kay v. Atherton Local Board*, 42 J.P. 792.

Set-off.—Set-off implies the subtraction or taking away of one demand from another opposite or cross-demand, so as to extinguish the smaller demand and reduce the greater by the amount of the less; or, if the opposite demands are equal, to extinguish them both: *Waterman on Set-off*, p. 1.

The defence of set-off at law was first created by 2 Geo. II. c. 22, s. 13, and 2 Geo. II. c. 24, s. 5. Division Courts are vested with the same powers as the High Court in all matters of set-off. By counterclaim, also, unliquidated damages may now be set up against debts, and debts against damages, and damages against damages. See *Gray v. Webb*, 21 Ch. D. 802; see also sections 73 and 74 and notes thereto.

The distinction between set-off and counterclaim is thus defined: "A set-off alleges a liquidated debt due from the plaintiff to the defendant, which balances the liquidated claim of the plaintiff, and shows on the whole account between the plaintiff and defendant nothing is due to the plaintiff. A set-off to an amount equal to the plaintiff's claim is therefore a defence to the action. A counterclaim, which is a creation of the Judicature Act, is on the other hand in the nature of a cross-action by the defendant, which may be made although in respect of, or against a claim for unliquidated damages:" *Stooke v. Taylor*, 5 Q.B.D. 576, *et seq.*, *per Cockburn, C.J.*; *Baines v. Bromley*, 6 Q.B.D. 694, *per Brett, L.J.* A counterclaim may exceed the plaintiff's claim while a set-off can only defeat the plaintiff's claim or reduce it *pro tanto*: see *Winterfield v. Bradnum*, 3 Q.B.D. 324; and cases cited in notes on counterclaim, *ante* p. 110.

This distinction is sometimes material especially with regard to the question of costs as a reference to the cases will show. The rights of a defendant with regard to the defence of set-off and counterclaim are discussed in the notes to section 75.

Notice of Set-off.—The notice, together with the particulars of the set-off must be given to the plaintiff six clear days (see notes to sections 91 and 131) before the day appointed for the sittings. It may be left for the plaintiff at his usual place of abode if such be within the division; or if living without the division the notice and particulars with a copy of same for the plaintiff must be left with the clerk. The clerk must then give the plaintiff notice according to Form 195 by mailing the same to him in a letter, duly registered, addressed to his usual place of abode or business, together with one of the copies of the particulars: provided that in case of non-compliance with this rule, the judge may, on such terms as he shall think fit, adjourn the trial of the action to enable the defendant to give such notice or may allow such notice to be given and the trial of the action to proceed at once: Rule 115. This rule extends to counterclaim and statutory defences as well as to set-off in all cases except garnishee proceedings. In the latter case it is sufficient if the particulars are filed with the clerk within the time limited by section 193 and Rule 86. *Quære*: Whether the power of the judge to adjourn the trial under Rule 115, applies to garnishee proceedings? Where there are several defendants, and some have not been served, the name or names of those not served may be struck out, and the action will then proceed as to set-off and other matters as if all defendants had been served: Rule 210. The provisions of this section are also extended to a defendant proceeded against under section 110 and the plaintiff cannot by suing only one of several persons jointly liable, prevent a set-off, counterclaim or other defence, which all or some of them would have had, from being set up: *Rule 282*; *Stackwood v. Dunn*, 3 Q.B. 822; *Toplis v. Grave*, 5 Bing. N.C. 636.

If judgment on the defendants set-off exceeds the plaintiffs demand, execution may issue for the balance if it does not exceed a sum within the jurisdiction, or if the defendant files with the clerk a consent in writing to abandon such excess: Rule 127. The effect of this rule is that the defendant can recover on his set-off up to \$60 in tort, \$100 for debt, and \$200 for an amount ascertained by the signature of the defendant. The consent in writing to the abandonment of the excess is a condition precedent to granting to a defendant relief if the balance exceeds the jurisdiction: see section 76, and rule 114. The court must hold its hand so soon as the plaintiff's claim is equalled by set-off or counterclaim, unless the balance then due is within the jurisdiction: *Davis v. Flagstaff Silver Mining Co.*, 3 C.P.D. 228; see notes to section 76.

If the balance is in favor of the defendant the judge may give judgment in favor of the defendant for such balance or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case as provided by section 136: Rule 109. The question of costs is not affected by this rule which in the absence of any order would follow the event under section 213. When the amount due the defendant exceeds the amount claimed by the plaintiff, the plaintiff may either be non-suited or an amount sufficient to satisfy his claim may be applied thereon but the adjudication is no bar to the recovery of the defendant of the balance of the set-off: see sections 76 and 136.

If the plaintiffs action should be discontinued or dismissed after a counterclaim or set-off is set up by the defendant the counterclaim or set-off may nevertheless be proceeded with: Rule 111: see also *McGowan v. Middleton*, 11 Q.B.D. 464.

With a view to save expenses in proof the plaintiff may give the defendant notice in Form 19 in writing that he admits part of the set-off. The notice must be served at least five days before the day fixed for the trial: Rule 103.

Statute of Limitations.—The Statute of Limitations is one of the most usual of statutory defences. The notice setting it up need not specify the particular statute on which it is intended to rely. Form 19 is sufficient: *Eaton v. Tapley*, (1899) 1 Q.B. 953. The statute commences to run when the right to bring an action has accrued: *Colvin v. Buckle*, 8 M. & W. 680, and stops on the issue of the summons and during its currency: *Turley v. Williamson*, 15 C.P. 538.

It has been said that "a plea of the Statute of Limitations is now considered a defence on the merits:" *Archbalds' Prac.*, 12th Ed. 988; *Rucker v. Hannay*, 3 T.R. 124; *Maddocks v. Holmes*, 1 B. & P. 228; *Dobie v. Lemon*, 12 P.R. 64. But see *Brigham v. Smith*, 3 Ch. Cham. 313. The Statute of Limitations being a defence permitted by law and the real question between the parties being as to the right of the plaintiffs to recover the damages claimed by them, "the very right and justice of the case demands that the plaintiffs should not recover if the statute afforded a bar to their right to do so:" *Patterson v. Central Canada Savings and Loan Co.*, 17 P.R. 470.

Rent and Specialties.—Actions for rent upon an indenture of demise, actions upon a bond or other specialty (except upon the covenants contained in any indenture of mortgage made on and after 1st July, 1894, or bonds, covenants or recognizances of suretyship for public officers) or upon a recognizance, must be commenced within twenty years. Actions upon an award where the submission is not by specialty, actions for an escape, and for money levied on execution, within six years. Actions for penalties, damages, or sums of money given to the party aggrieved by any statute, within two years after the cause of action arose. Actions on covenants contained in mortgages made on or after 1st July, 1894, within ten years. But these limitations do not extend to any action

given by statute, where the time for bringing the action is by the statute specially limited: R.S.O. c. 72, section 1. This section was originally taken from the Imperial Statute, 3 & 4 Wm. 4 c. 42, section 3. The exception as to covenants in mortgages was introduced in 1894.

Mortgages.—An action on a covenant in a mortgage made before 1st July, 1894, is only barred after twenty years: *Allan v. McTavish*, 2 A.R. 278; *McDonald v. Elliott*, 12 O.R. 98; but see *Sutton v. Sutton*, 22 Ch. D. 511; *Re Powers*, 30 Ch. D. 291; *Fearnside v. Flint*, 22 Ch. D. 579. When the mortgage was made on or after 1st July, 1894, the action is barred after ten years: R.S.O. c. 72, s. 1 (b). Time begins to run from the earliest date when the plaintiff can sue, so that when the principal becomes due for default in paying interest, the statute commences to run: *Reeves v. Butcher*, (1891) 2 Q.B. 509.

Where a foreclosure or redemption suit is between the mortgagee and mortgagor who is liable on the covenant, or his heirs, full arrears of interest to the statutory limit on the specialty (20 years or now 10 years) may be allowed: *Du Vigier v. Lee*, 2 Hare 326; *Elvy v. Norwood*, 5 DeG. & Sm. 240; *Howereen v. Bradburn*, 22 Gr. 96; *Airey v. Mitchell*, 21 Gr. 512; *Macdonald v. Macdonald*, 11 O.R. 187; but see these cases discussed in *McMicking v. Gibbons*, 24 A.R. 586, in which it was held that only six years' arrears could be allowed against a subsequent incumbrancer coming in to redeem: see R.S.O. c. 133, s. 17.

Where the mortgagor is in possession, a mortgage may be presumed to be satisfied after twenty (now ten) years from the time fixed for payment of the mortgage money: *Doc d. McGregor v. Hawke*, 5 O.S. 496.

When the covenant is to pay the principal on demand, and interest in the meantime, the time does not commence to run until a demand is made: *Re Brown's Estate*, (1893) 2 Ch. 300. The point has not arisen whether a covenant implied in a mortgage under R.S.O. c. 121, s. 5, is "contained" therein. The English decisions as to the effect of the Real Property Limitation Act, on covenants in mortgages and actions on judgments are not applicable: *Allan v. McTavish*, 2 A.R. 278; *Boice v. O'Loane*, 3 A.R. 167; *McCullough v. Sykes*, 11 P.R. 337; *Chard v. Rae*, 18 O.R. 371.

Distributive Share on Intestacy.—An action for a legacy must be brought within ten years, and an action for a share on an intestacy within twenty years: R.S.O. c. 72, s. 9; R.S.O. c. 133, s. 23. A similar discrepancy occurs in England: see *Williams on Executors*, 9th ed. 1925. The "present right," mentioned in R.S.O. c. 72, s. 9, to receive the share does not arise before the assets are actually received by the administrator, and, therefore, where some assets had been received more than twenty years, and others within twenty years, the action was held to be barred as to the former but not as to the latter: *Re Johnson*, *Sly v. Johnson*, 29 Ch. D. 964.

Rent.—Actions for rent, which term is made to include all annuities and periodical sums of money charged upon or payable out of any land, and actions for the recovery of land, must be brought within ten years: R.S.O. c. 133, s. 4.

Actions on Judgments.—An action on a judgment of a court of record may be brought within 20 years: *Boice v. O'Loane*, 3 A.R. 167; see *Mason v. Johnston*, 20 A.R. 412; *Caspar v. Kenchie*, 41 U.C.R. 599; *Price v. Wade*, 14 P.R. 351; and the entry of a suggestion by way of revivor will effectually renew the time from which the statute begins to run: *Allison v. Breen*, 36 C.L.J. 165.

Sureties for Public Officers.—Actions upon bonds, covenants or recognizances of suretyship for public officers must be brought within ten years: R.S.O. c. 16, s. 27.

Penalties.—Actions for penalties by an informer suing *qui tam* within one year: 31 Eliz. c. 5, s. 5; see R.S.O. c. 86, s. 24; but neither this limitation nor that of R.S.O. c. 72, s. 1, applies to an action not given to a common informer or to a party aggrieved; *Robinson v. Currey*, 7 Q.B.D. 465.

Malpractice.—Actions against physicians for malpractice must be brought within one year from the date when in the matter complained of the professional service terminated: R.S.O. c. 176, s. 41; *Miller v. Ryerson*, 22 O.R. 369.

Lord Campbell's Act.—Actions for damages for death by wrongful act within one year from the death: R.S.O. c. 166, s. 6.

Workmen's Compensation.—Actions for damages for injury, under the Workmen's Compensation Act within six months: R.S.O. c. 160, s. 9.

Municipal Corporations.—Actions against a municipality for damages arising from nonrepair of streets within three months: R.S.O. c. 223, s. 606; *Pearson v. York*, 41 U.C.R. 378.

Public Officers.—Actions against public officers within six months: R.S.O. c. 88, s. 13; R.S.O. c. 99, s. 44; Criminal Code 1892, s. 975.

Railways.—Actions against railway companies for damages or injury sustained by reason of the railway within six months: R.S.O. c. 207, s. 42; 51 Vic. c. 29, s. 287 (D.); and within twelve months, as to electric railways subject to the Electric Railway Act: R.S.O. c. 209, s. 84.

Policies.—As to actions on life policies: see R.S.O. c. 203, s. 148 (2); and fire policies: R.S.O. c. 203, s. 168 (22).

Covenants of Indemnity.—A cause of action on a covenant to indemnify only accrues on payment under the indemnity: *Ives v. Ives*, T.T. 3 Vic.; *Collinge v. Heywood*, 9 A. & E. 633; *Blyth v. Fladgate*, (1891) 1 Ch. 362.

Fraudulent Concealment and Misrepresentation.—The fraudulent concealment by the defendant of the plaintiff's right of action does not prevent the statute from running: *Imperial Gas Co. v. London Gas Co.*, 10 Ex. 39. But if the cause of action be one over which the Court of Chancery would have had concurrent jurisdiction, the fraudulent concealment of the cause of action would prevent the statute from running: *Gibbs v. Guild*, 8 Q.B.D. 296; 9 Q.B.D. 59.

In an action for fraudulent misrepresentation the statute begins to run from the time of the misrepresentation, not from its discovery: *Dickson v. Jarvis*, 5 O.S. 694; but see *Gibbs v. Guild*, *supra*.

Actions of Account.—All actions of account, or for not accounting, or for such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants, shall be commenced within six years after the cause of such action arose; and no claim in respect of a matter which arose more than six years before the commencement of the action shall be enforceable by action by reason only of some other matter of claim comprised in the same account, having arisen within six years next before the commencement of the action: R.S.O. c. 72, s. 2.

This section is taken from the Imperial Act, 19 & 20 Vic. c. 97, s. 9.

The Statute of Limitations, 21 James I., c. 16, excepted "such accounts as concern the trade of merchandise between merchant and merchant, their factors or servants." This exception did not apply to an action of *indebitatus assumpsit*, but only to the action of account or to an action on the case for not accounting: *Inglis v. Haigh*, 8 M. & W. 769; *Russell v. Robertson*, 1 U.C.R. 235. The phrase "comprised in the same account," means "that would have been comprehended in:" *Knox v.*

Gye, L.R. 5 H.L. 656. Where partnership dealings were closed more than six years before action, an action for an account was held to be barred, notwithstanding a payment to plaintiff's solicitor, without his knowledge, within six years, paid as the full amount due him: *Cotton v. Mitchell*, 3 O.R. 421.

Effect of Special Statute.—The limitation as to time specially fixed by a statute for the bringing of an action supersedes any general limitation: *Cairns v. Water Commissioners of Ottawa*, 25 C.P. 551; *Trotter v. Corp. of Toronto*, 29 C.P. 365; *Atty.-Gen. v. Walker*, 3 A.R. 195; *Sullivan v. Corp. of Barrie*, 45 U.C.R. 12; *Watson v. Lindsay*, 27 Gr. 253.

Specialties.—A foreign judgment is not a specialty: *North v. Fisher*, 6 O.R. 206; *Duplex v. De Rozen*, 2 Vern. 540.

Where an English Companies' Act makes calls for shares a specialty debt, it does not thereby become a specialty debt of this province: *Barned's Banking Co. v. Reynolds*, 36 U.C.R. 256.

Computation of Time.—The time is reckoned exclusively of the day on which the cause of action arose: *Freeman v. Read*, 4 B. & S. 183. For the purposes of the statute the date of the summons cannot be contradicted: *Whipple v. Manley*, 1 M. & W. 432.

A solicitor's bill of costs for services rendered in obtaining judgment will be barred after six years from the entry of judgment: *Lizars v. Dawson*, 32 U.C.R. 237; and if the action is settled before judgment, the statute will run from the date of the settlement, not from the date of the retainer: *Gourley v. McAloney*, 29 N.S.R. 319.

In an action against a solicitor for negligence the right of action arises when the negligence was committed, and not when it was discovered by the client: *Wood v. Jones*, 61 L.T. 551; *Armstrong v. Milburn*, 54 L.T. 723; *Dooby v. Watson*, 39 Ch. D. 178; *Blyth v. Fladgate*, (1891) 1 Ch. 362.

The court has authority to prevent a solicitor pleading the statute to a just claim: *Dougall v. Cline*, 6 U.C.R. 546.

When damage is the gist of the action the time runs from the accrual of such damage: *Beau v. Wade*, 1 C. & E. 516.

The statute does not begin to run as against a surety claiming contribution until his own liability is ascertained; *Wolmerhausen v. Gullick*, (1893) 2 Ch. 514.

A bill of exchange fell due on 1st Dec., 1875, and an action commenced thereon on 1st Dec., 1881, was held in time: *Edgar v. McGee*, 1 O.R. 287.

The statute is not a bar to a set-off unless the six years have expired before the action is brought: *Re Ballard, Lovell v. Forester*, W.N. (1890) 64.

In an action for malicious prosecution the cause of action commences to run from the plaintiff's acquittal of the offence charged: *Crandall v. Crandall*, 30 C.P. 497.

An action of conversion must be brought within six years from the time a cause of action first accrues against the defendant. The fact that the plaintiff had an earlier cause of action for the same chattel against another person from whom the defendant obtained it, is of no consequence: *Miller v. Dell*, (1891) 1 Q.B. 468.

An infant has six years after attaining his majority to bring an action for work and labor performed during his minority: *Taylor v. Parnell*, 43 U.C.R. 239; 21 James I. c. 16, s. 7; R.S.O. c. 72, s. 3.

When money is intrusted to another for safe custody until demand, the time does not run until demand, though it is contemplated that the

bailee may use the money in business: *Re Tidd*, *Tidd v. Overell*, (1893) 3 Ch. 154.

Payment of interest on a demand note is evidence of demand, from which time the statute would run: *Brown v. Rutherford*, 14 Ch. D. 687.

In order to keep a claim alive in the Division Court, proceedings must be taken under Rule 25: see also *Manby v. Manby*, 3 Ch. D. 101. See notes *supra* p. 162.

When through a mistake by the officers of the court the summons was a nullity, the judge ordered a new summons to issue bearing the same date as the first to save the Statute of Limitations: *Foster v. Temple*, 5 D. & L. 230.

Disabilities.—The expression "beyond seas" in 4 and 5 Anne, c. 3 and 21 James I. c. 16, means the same as "out of Ontario" in R.S.O. c. 72 ss. 5 and 9 when applied to a defendant served in this province; and to make the statute run in defendant's favor his return from beyond seas must be open and of sufficient duration to enable the creditor, if he had knowledge of it, to bring an action, though such knowledge is not essential: *Boulton v. Langmuir*, 17 C.L.T. 397.

The fact that the cause of action is one as to which service out of the jurisdiction may be allowed, will not prevent the disability attaching: *Musurus Bey v. Gadban*, (1894) 2 Q.B. 352. Merely touching Ontario for a temporary purpose would not be a "return": *Gregory v. Hurrill*, 1 Bing. 324; but a temporary sojourn, even by a foreigner, would be a "return": *Pardo v. Bingham*, L.R. 4 Ch. 785. If the statute commences to run subsequent disability does not stop it: *Rhodes v. Smethurst*, 6 M. & W. 351; *Doc d. Dixon v. Grant*, 3 O.S. 511; *Wigle v. Stewart*, 28 U.C.R. 427.

It would appear to be doubtful whether there is any saving for disabilities when the limitation is provided by a special statute, *e.g.*, a bond for a public officer under R.S.O. c. 16, s. 27; see *Miller v. Ryerson*, 22 O.R. 369.

Payment or Acknowledgment in Respect of Specialty Debts.—The statute 21 James I., c. 16, contained no provision respecting payments or acknowledgments, but by numerous cases thereon, reference to which is made *infra*, p. 234, a new promise was inferred from a payment and also from an acknowledgment when such a promise could be inferred. The cases under the statute of James, as modified by R.S.O. c. 146, are not, therefore, strictly applicable to acknowledgments or payments made with respect to specialty debts. Section 9 of R.S.O. c. 72, makes express provision for acknowledgments and payments and gives a new starting point for the limitation provided for in the earlier sections of that statute. The section is taken from 3 & 4 Wm. 4 c. 42, section 5. The principal point of difference from actions on simple contract debts is that though an acknowledgment of a specialty debt be made under circumstances which preclude a promise to pay from being implied, it will, nevertheless be sufficient to give a new starting point to the period of limitation: *Moodie v. Bannister*, 4 Dr. 432; and will be equally good if not made to the creditor, but to a third party or in answer to a suit against the debtor to which the creditor is not a party: *Ib.*

It would appear also that an acknowledgment by one joint debtor may keep alive the specialty debt against the others. Section 2 of R.S.O. c. 146, merely applies to cases within the statute 21 James I. In England under 19 & 20 Vic. c. 97 (The Mercantile Amendment Act) section 14, it is expressly provided that no joint debtor, &c., in cases coming under 3 & 4 Will. IV. c. 42, shall lose the benefit of that statute by an acknowledgment given by another joint debtor. A payment by any person liable or his agent will keep the specialty debt alive as against all persons

liable; *Re Frisby*, Allison v. Frisby, 43 Ch. D. 106; *Barnes v. Glenton*, (1898) 2 Q. B. 223; see s.c. (1899) 1 Q. B. 885; even a payment on a collateral security. *Slater v. Mosgrove*, 29 Gr. 392.

A tenant for life of land under a devise by the obligor in a specialty, in which the heirs were bound, is a "party liable" within R.S.O. c. 72, s. 9; *Roddan v. Morley*, 1 DeG. & J. 1, and so is an assignee of an equity of redemption; *Forsyth v. Bristowe*, 8 Ex. 716, and so is a tenant for life of an equity of redemption; *Dibb v. Walker*, (1893) 2 Ch. 429, and a payment by them will be sufficient to keep alive an action on the covenant. The surety on a joint and several covenant made by him and his principal remains liable although no payment or acknowledgment may have been made by him within the statutory period if the principal has paid interest within such period; *Re Frisby*, Allison v. Frisby, 43 Ch. 106.

But where the liability of the party making the payment stands upon totally different grounds from that of the person sought to be affected thereby, the payment will be ineffective as to the latter: *Coope v. Cresswell*, L.R. 2 Ch. 112.

Acknowledgment with Respect to Simple Contract Debts.—Section 1 of R.S.O. c. 146 provides that "no acknowledgment or promise, by words only, shall be deemed to take out of the operation of Act 21 James I. any cases falling within the provisions of the said Act respecting actions (a) of account and upon the case other than such accounts as concern the trade of merchandise between merchant and merchant, their factors and servants; (b) on simple contract or of debt grounded upon any lending or contract without specialty, and (c) of debt for arrears of rent; or to deprive any party of the benefit thereof, unless such acknowledgment or promise is made or contained by or in some writing signed by the party chargeable thereby, or by his agent duly authorized to make such acknowledgment or promise." This section is taken from 9 Geo. IV. c. 14, s. 1, and 19 and 20 Vic. c. 97, s. 13.

The Statute 21 James I. c. 16 made no provision for extending the period of limitation because of an acknowledgment or part payment. The statute was said to be founded upon the presumption of payment, and that presumption was rebutted by an admission that the debt was still owing: *Lloyd v. Maund*, 2 T.R. 760, 762; *Frost v. Bengough*, 1 Bing. 266; 25 R.R. 621; but this theory seems to be untenable: see 2 Wm. Saund. 183, 184. The effect of the acknowledgment was that a new promise was inferred based upon the consideration of the old debt: *Phillips v. Phillips*, 3 Hare 299; *Earle v. Oliver*, 2 Ex. 90; but this view seems to be based upon the exploded doctrine of past consideration, and is therefore unstable ground. Sir Frederick Pollock's view is that the statute was one of procedure only, and that the debtor might waive the benefit thereby conferred: see Pollock on Contracts, 5th Ed., pp. 170, 624. There are, however, many decisions which can be reconciled only with the theory of a new promise.

To What Causes of Action Acknowledgments Extend.—The Statute of James prescribes, among others, periods of limitation for action upon the case (which includes actions for breach of contract) and of trespass, detinue, trover, assault, menace, battery, wounding, imprisonment and replevin. The doctrine of acknowledgments extends only to actions in which debts are sought to be recovered. "To revive a debt by promise and take a case out of the statute there must be an antecedent debt." An acknowledgment of negligence in making an investment on insufficient security will not take a case out of the statute: *Whitehead v. Howard*, 2 Brod. & Bing. 372; 23 R.R. 471. An acknowledgment is inapplicable to an action of trespass: *Hurst v. Parker*, 1 B. & Ald. 92; 18 R.R. 440;

or an action of negligence by an attorney: *Short v. McCarthy*, 3 B. & Ald. 626, 22 R.R. 503. In such cases the action, if maintainable at all, must be on the new promise.

There are no statutory provisions respecting acknowledgments in actions for penalties or such as concern the trade of merchandise between merchant and merchant, their factors and servants.

Sufficient Acknowledgments.—There must be one of three things to take a case out of the statute. Either there must be an acknowledgment of the debt from which a promise to pay is to be implied, or, secondly, there must be an unconditional promise to pay the debt, or, thirdly, there must be a conditional promise to pay the debt and evidence that the condition has been performed: *per Mellish L.J.*; *Mitchell's Claim*, L.R. 6 Ch. 828. From a simple acknowledgment a promise to pay may be implied, but if there be an express promise no promise can be implied from the acknowledgment: *Meyerhoff v. Froehlick*, 4 C.P.D. 63.

The following are instances of sufficient acknowledgments:—

Depositions in another action signed by the debtor: *Roblin v. McMahon*, 18 O.R. 219; *Smith v. Poole*, 12 Sim. 17. *See quare* whether this rule can be applied to cases not within R.S.O. c. 72, s. 9.

A promise to have the amount placed to the plaintiff's credit: *Jones v. Brown*, 9 C.P. 201.

"I will try to pay you a little at a time if you will let me. I am sure I am anxious to get out of your debt. I will endeavor to send you a little next week:" *Lee v. Wilmot*, L.R. 1 Ex. 364.

"I shall be obliged to you to send in your account made up to Xmas last. I shall have much work to be done this spring, but cannot give further orders until this be done." Again, "You have not answered my note. I again beg you to send in your account, as I particularly require it in the course of this week:" *Quiney v. Sharpe*, 1 Ex. D. 72.

"I return . . . about Easter. If you send me the particulars of your account, with vouchers, I shall have it examined and cheque sent to you for the amount due, but you must be under some great mistake in supposing that the amount due to you is anything like the sum you now claim:" *Skeet v. Lindsay*, 2 Ex. D. 314.

"The old account between us which has been standing over so long has not escaped our memory, and so soon as we can get our affairs arranged we will see you are paid; perhaps in the meantime you will let your clerk send in an account of how it stands:" *Chasmore v. Turner*, L.R. 10 Q.B. 500.

"Send in your account:" *Curwen v. Milburn*, 42 Ch.D. 424.

"At present it is utterly out of my power to do anything; I am willing to pay you any reasonable interest to let the matter remain for the present:" *Wilby v. Elgee*, L.R. 10 C.P. 497.

A request for delay: *Collis v. Stack*, 1 H. & N. 605; *Cornforth v. Smithard*, 5 H. & N. 13.

"The best way would be for you to draw for the balance of your money:" *Dabbs v. Humphries*, 10 Bing. 446.

A promise to remit: *Lang v. MacKenzie*, 4 C. & P. 463.

"I don't see how it is possible for me to be indifferent on the matter of this debt. If I were able in any way to reduce it further, you may be quite sure I should do so:" *Re Buskin*, 15 R. 117.

"I shall go to my attorneys and pay the debt and settle it:" *Triggs v. Newnham*, 1 C. & P. 631.

Letters expressing present inability but a desire to pay: *Grant v. Cameron*, 18 S.C.R. 716; *Lee v. Wilmot*, 4 H. & C. 469; *Dodson v.*

Mackey, 4 N. & M. 327; Bird v. Gammon, 3 Bing. N.C. 883; Morrell v. Frith, 3 M. & W. 402.

A letter saying the demand is not a just one, and disputing the amount, but, "I am ready to settle the account whenever" the plaintiff "thinks proper to meet on the business:" Colledge v. Horn, 3 Bing. 119; 28 R.R. 606.

An admission of a debt coupled with a claim that it was discharged by a written instrument which proved not to amount to a legal discharge: Partington v. Butcher, 6 Esp. 66.

Asking an explanation of the items of the account: Sidwill v. Mason, 2 H. & N. 306.

Crediting the amount in a contra account: Waller v. Lacy, M. & G. 54.

A promise to pay interest on the amount claimed: Taylor v. Steele, 16 M. & W. 665.

Inserting the amount of the creditor's claim in a statement of the debtor's affairs given by him to the creditor: Holmes v. Mackrell, 3 C.B. N.S. 789.

Referring a creditor to an assignee for the benefit of creditors: Baillie v. Inehiquin, 1 Esp. 435; but see *Re Mitchell's Claim*, L.R. 6 Ch. 828.

A letter from a surety asking the creditor to sue the principal debtor: Fisk v. Mitchell, 24 L.T. 272; Humphreys v. Jones, 14 M. & W. 1.

A debtor endorsing a barred note with his initials and the date: Bourdin v. Greenwood, L.R. 13 Eq. 281.

Giving a bill of exchange to the creditor; *Ex parte Wilson*, 1 Mont. D. & D. 586.

An account stated although the items are all on one side: House v. House, 24 C.P. 526.

An acknowledgment assuming a debt as to which there was a contention that it should be charged against a younger sister and brother is sufficient also for the purpose of the Statute: Lyon v. Tiffany, 16 C.P. 197.

An acknowledgment of an unsettled account on which something is or may be due: Banner v. Berridge, 18 Ch. D. 254; Prance v. Sympton, Kay 678; Curwen v. Milburn, 42 Ch. D. 424, or by recital in a reference of accounts to arbitration: Cheslyn v. Dalby, 4 Y. & C. 238; but see Hales v. Stevenson, 7 L.T. 317, 8 L.T. 798.

Conditional Promises.—If the promise to pay is conditional it must be shown that the condition has been performed: Turner v. Smart, 6 B. & C. 603; 30 R.R. 461. The following are instances of conditional promises requiring proof of the happening of the specified event.

"I will pay as soon as I am able:" Seales v. Jacobs, 3 Bing. 638; Tanner v. Smart, 6 B. & C. 603; 30 R.R. 461;

"As soon as in my power:" Haydon v. Williams, 7 Bing. 163; Hammond v. Smith, 33 Beav. 452;

"Shall remember you as soon as possible:" Gemmell v. Cotton, 6 C.P. 57;

"When I may be able to pay you, I cannot now say:" Woodham v. Hollis, 3 L.J. (K.B.) 70;

"I shall be happy to pay as soon as convenient:" Edmunds v. Downes, 2 C. & M. 459;

"If you can recover from G., you can pay yourself thereout:" Ayton v. Bowles, 4 Bing. 105;

"If in funds I would immediately pay the money:" Richardson v. Barry, 29 Beav. 22.

"I will send you a cheque as soon as I can;" *Re Bethell*, 34 Ch.D. 561.

"I shall be glad, as soon as my position becomes somewhat better, to begin again and continue with my instalments;" *Meyerhoff v. Froelich*, 3 C.P.D. 333; 4 C.P.D. 63;

"It will be impossible for me to pay you anything until my son's estate is wound up;" *Roblin v. McMahon*, 18 O.R. 219;

A recognition of a debt in a submission to arbitration is ineffective if the arbitration proves abortive; *Hales v. Stevenson*, 7 L.T. 317; 8 L.T. 798.

A statement by an executor that if there were assets the debt should be paid is condition; *Lampman v. Davis*, 1 U.C.R. 179.

When the condition is performed, time immediately commences again to run although the creditor is not aware of its performance; *Waters v. Thonet*, 2 Q.B. 757; *Bateman v. Brider*, 3 Q.B. 574.

New Time of Payment.—Where the acknowledgment specifies a new time for payment, no promise can be implied to pay at an earlier date, *e.g.*, a promise to pay in two years: *Wheatley v. Williams*, 1 M. & W. 533; or after taxation of costs: *Nichols v. Regent's Canal Co.*, 63 L.J.Q.B. 641; 71 L.T. 249, 836; *Archer v. Leonard*, 15 Ir. Ch. R. 267.

But coupling an acknowledgment with a suggestion as to a particular mode of payment will not of itself prevent an absolute promise being inferred: *Evans v. Simon*, 9 Ex. 282.

To Whom to be Made.—The acknowledgment must be made to the creditor or some person on his behalf: *Goodman v. Boyes*, 17 A.R. 528; *Tanner v. Smart*, 6 B. & C. 603; 30 R.R. 461; *Rogers v. Quinn*, 26 L.R. Ir. 136; *Grenfell v. Girdlestone*, 2 Y. & C. 662; *Fuller v. Redman*, 26 Beav. 614; *Green v. Humphreys*, 26 Ch. D. 474; *Stamford Banking Co. v. Smith*, (1892) 1 Q.B. 765.

A letter to the debtor's partner undertaking to give him an assignment on his satisfying plaintiff's debt and doing other things is sufficient: *Re Hindmarsh*, 1 Dr. & Sm. 129.

An acknowledgment after the creditor's decease to the person who is entitled to and afterwards does take out Letters of Administration is sufficient: *Robertson v. Burrill*, 22 A.R. 356; *Clark v. Hooper*, 10 Bing. 480; see *Beard v. Ketchum*, 5 U.C.R. 114.

By Whom to be Made.—The acknowledgement must be made by the debtor or his agent.

An acknowledgment by a wife who has been accustomed to act as the husband's agent in purchasing the goods and managing the business is sufficient: *Anderson v. Sanderson*, 2 Stark. 204; 17 R.R. 681; 19 R.R. 703; *Gregory v. Parker*, 1 Camp. 394, 10 R.R. 712.

An acknowledgment of a debt by an infant is sufficient: *Willins v. Smith*, 4 E. & B. 180.

An acknowledgment by an executor or administrator is sufficient: *Smith v. Poole*, 12 Sim. 17; *Fordam v. Wallis*, 10 Hare 217; and an acknowledgment by one of several executors is good: *Re MacDonald*, *Dick & Fraser*, (1897) 2 Ch. 181; *Fordham v. Wallis*, 10 Hare 217; but see *Tullock v. Dunn*, Ry. & Mood. 416; 27 R.R. 765; *Scholey v. Walton*, 12 M. & W. 510.

After judgment for administration the personal representative has no right to give an acknowledgment: *Phillips v. Beal*, 32 Beav. 27; see *Midgley v. Midgley*, (1893) 3 Ch. 282.

A mere advertisement for creditors by a personal representative is insufficient, but if the advertisement states he will pay all debts justly

due it may be sufficient: *Scott v. Jones*, 1 Russ. & Myl. 255; 4 Cl. & F. 382.

An executor *de son tort* cannot make an acknowledgment binding on the rightful administrator: *Grant v. McDonald*, 8 Gr. 468.

Signature.—The acknowledgment must be signed. But it may be at the top of an account in the debtor's handwriting: *Holmes v. Mackrell*, 3 C.B.N.S. 789.

An unsigned acknowledgment enclosed in a letter written by the debtor's wife was held to be insufficient: *Ingram v. Little*, 1 Cab. & E. 186.

Must be Made Before Suit.—The acknowledgment must be made before action: *Bateman v. Pinder*, 3 Q.B. 574; see *Lucas v. Dixon*, 22 Q.B.D. 357.

Parol Evidence.—Where no amount is specified parol evidence may be given to identify the debt referred to and the amount thereof: *Lechmere v. Fletcher*, 1 C. & M. 623; 3 Tyr. 450; *Dickenson v. Hatfield*, 5 C. & P. 46; *Hartley v. Wharton*, 11 A. & E. 934; *Cheslyn v. Dalby*, 4 Y. & C. 238; *Spickernell v. Hotham*, Kay 669; *Barwick v. Barwick*, 21 Gr. 39.

If the acknowledgment is without date parol evidence may be given to show when it was made: *Edmunds v. Downs*, 2 C. & M. 459; and if it has been lost, parol evidence may be given of its contents: *Haydon v. Williams*, 7 Bing. 163.

Parol evidence may be given to show that the facts attending the acknowledgment were such as to negative a promise to pay, as where the parties agreed to a set-off: *Cripps v. Davis*, 12 M. & W. 159.

The question should be left to the jury as to whether the acknowledgment refers to the debt: *Frost v. Bengough*, 1 Bing. 267, but if there was only one debt it will be presumed to do so: *Barwick v. Barwick*, 21 Gr. 39; *Tans v. Davies*, 4 A. & E. 840.

If the acknowledgment is, owing to extrinsic facts, ambiguous, it may be left to the jury to say whether a promise can be implied therefrom: *Lloyd v. Maund*, 2 T.R. 760; *Linsell v. Bonsor*, 2 Bing. N.C. 241; *Morrell v. Frith*, 3 M. & W. 402; but ordinarily the construction and effect of the acknowledgment is for the judge: *Sidwell v. Mason*, 2 H. & N. 306; *Morrell v. Frith*, 3 M. & W. 402.

Insufficient Acknowledgments.—Two tests must be applied to an acknowledgment: First, the acknowledgment must be clear in order to raise the implication of a promise to pay. An acknowledgment which is not clear will not raise that inference: Secondly, supposing that it is an acknowledgment of a debt which would, if it stood by itself be clear enough, still if words are found combined with it which prevent the possibility of the implication of the promise to pay arising, then the acknowledgment is not clear within the meaning of the definition; because not merely is there found in the words something that expresses less than a promise to pay; but because the words express the lesser in such a way as to exclude the greater: *Green v. Humphreys*, 26 Ch. D. 474.

The following are instances of insufficient acknowledgments:

"I cannot afford to pay my new debts, much less my old ones:" *Knott v. Farren*, 4 D. & Ry. 179.

"I will see my attorney and tell him to do what is right:" *Miller v. Caldwell*, 3 D. & Ry. 267.

"I know that I owe the money, but the bill I gave was on a 3d. receipt stamp, and I will never pay it:" *A'Court v. Cross*, 3 Bing. 329.

"Send me your bill, and if just I will not give you the trouble of going to law:" *Spong v. Wright*, 9 M. & W. 629.

"I thank you for your very kind intention to give up the rent of T.R.," (an estate of his wife, the rent of which was being applied on the debt.) "But I am happy to say at that time, both principal and interest will have been paid in full." *Green v. Humphreys*, 26 Ch. D. 474.

"I have a receipt in full of all demands. I shall search for it and let you know in the event of my not being able to find it." *Brydges v. Plumptre*, 9 D. & Ry. 746; *Birk v. Guy*, 4 Esp. 184.

Where a debtor disputed the earlier items in the account, but admitted the subsequent ones, and enclosed a cheque therefor, no implication of a promise to pay the earlier items could be raised: *Brigstocke v. Smith*, 1 C. & M. 483; 3 Tyr. 445; 38 R.R. 676.

An unaccepted offer to pay in goods: *Cawley v. Furnell*, 12 C.B. 291; or land: *Young v. Moore*, 23 U.C.R. 151; or shares: *Lowndes v. Garnett & Moseley Gold Mining Co.*, 10 L.T. 329.

The insertion of a debt in a bankrupt's statement of affairs: *Everett v. Robertson*, 1 E. & E. 16; *Courtney v. Williams*, 3 Hare 539; *Ex parte Topping*, 4 De G., J. & S. 551; *Pott v. Clegg*, 16 M. & W. 321.

An offer "without prejudice" if unaccepted: *Mitchell's Case*, L.R. 6 Ch. 822.

"I acknowledge the receipt of the money, but the testatrix gave it to me." *Owen v. Wolley*, B.N.P. 148.

An admission made to a person who at the same time purported to sign a discharge of the debt: *Goate v. Goate*, 1 H. & N. 29.

Where the fair effect of a letter is that the writer is not certain whether the debt is owing: *Collinson v. Margesson*, 27 L.J., Ex. 305; *McCormack v. Berzey*, 1 U.C.R. 388.

An unaccepted proposal offering to set-off a claim of the debtor: *Francis v. Hawkesley*, 1 E. & E. 1052; see *Williams v. Griffith*, 3 Ex. 335.

An account stated between the debtor and others though including the creditor's account: *Nash v. Hill*, 1 F. & F. 198.

Entries made in debtor's books: *Jackson v. Ogg*, 1 Johns. 397.

A qualified acknowledgment with a threat to do nothing if the creditor proceeds: *Fearn v. Lewis*, 6 Bing. 349; 31 R.R. 434.

A statement that he owed nothing, but offering \$50 rather than have trouble: *Spalding v. Parker*, 3 U.C.R. 66.

"The notes are genuine, but I am under the impression they were paid." *Grantham v. Powell*, 6 U.C.R. 494.

The debtor's attorney wrote that "the debt has not been paid, but the defendant has no property, and I cannot help the debt being unpaid." *Dougall v. Cline*, 6 U.C.R. 546.

An unaccepted offer of a composition: *Barnes v. Metcalf*, 17 U.C.R. 388; *Gibbon v. Bagshott*, 5 C. & P. 211.

For further instances see *Jupp v. Powell*, 1 C. & E. 349; *Robarts v. Robarts*, 3 C. & P. 296; *Re Wolmershausen*, 62 L.T. 541; *Cassidy v. Firman*, 15 W.R. 432; *Routledge v. Ramsey*, 8 A. & E. 221; *Crawford v. Crawford*, Ir. R. 2 Eq. 166.

Acknowledgment or Payment by Joint Contractor.—An acknowledgment or part payment by a partner of a partnership debt during the partnership would take the debt out of the statute: *Goodwin v. Parton*, 41 L.T. 91; 42 L.T. 568; *Watson v. Woodman*, L.R. 20 Eq. 730; but not after dissolution: *Thompson v. Waithman*, 3 Dr. 628. See R.S.O. c. 146, s. 2.

The provisions of section 2, of R.S.O. c. 146 as to the executors being chargeable on an acknowledgment or payment made by one, mean "personally chargeable": *Re Macdonald*, 2 Ch. 181, 188; *Re Hollingshead*, 37 Ch. D. 651.

Endorsements.—Section 4 of R.S.O. c. 146 is similar to Lord Tenderden's Act (9 Geo. IV. c. 14) s. 3.

An endorsement was formerly admissible as evidence of payment as being a statement made by a deceased person against his pecuniary interest: *Briggs v. Wilson*, 5 D. M. & G. 12.

An entry or declaration in writing against the pecuniary interest of the deceased in his books or in any other document than that containing the contract is still admissible: *Bradley v. James*, 13 C.B. 825; but not if made after the debt was barred: *Ib.*; *Newbould v. Smith*, 29 Ch. D. 882.

Acknowledgment by Part Payment.—A payment to take a case out of the statute of James must be clear and distinct: *Notman v. Crooks*, 10 U.C.R. 105. Payments should in the absence of specific directions by the creditor, be applied on the earlier items of an account, not barred at the time of payment, but before suit had subsequently become so: *Catheart v. Haggart*, 37 U.C.R. 47.

The payment must be made on account of the debt sued for: *Morgan v. Rowlands*, L.R. 7 Q.B. 493, and cases cited.

Payment of interest revives the principal: *Wilson v. Rykert*, 14 O.R. 188; but a compulsory payment of interest does not save the statute: *Ib.* The payment must be such as to warrant the jury in inferring an intention to pay the rest: *Boulbee v. Burke*, 9 O.R. 80; and if the defendant on making a part payment should say that, "he owes the money, but will not pay it," it will not be sufficient unless the jury think the words were spoken in jest: *Wainman v. Kynman*, 1 Ex. 118.

Payment to an assignor, after assignment of the debt, cannot be used as an acknowledgment in favor of the assignee: *Stamford, Banking Co. v. Smith*, (1892) 1 Q.B. 705. Payment of a dividend by an assignee for the benefit of creditors, and money received by the holder of a note from the maker within six years from the commencement of the action therefor, in payment of goods given before that period by the maker, as security for the note, is not a payment within the meaning of the authorities: *Fiskin v. Stewart*, 33 C.L.J. 41.

If there are two debts and a payment is made generally, it is for the judge, or if a jury, for them to say whether or not there is a payment on each of them: *Walker v. Butler*, 6 E. & B. 506; or they may be appropriated to the whole indebtedness: *Catheart v. Haggart*, 37 U.C.R. 47; *Stewart v. Gage*, 13 O.R. 458.

The creditor cannot, without the debtor's knowledge or assent, appropriate a payment to any particular debt to take it out of the statute; but it ought *prima facie* to be taken as paid on the debt not barred: *Nash v. Hodgson*, 25 L.J. Ch. 186; 6 DeG. M. & G. 474, 482.

The following have been held not to be such payments as are required to take the debt out of the statute: Payment of a dividend by an assignee under the Insolvent Act: *Davies v. Edwards*, 7 Ex. 22; nor payment by the inspectors of the debtors' inspectorship deed: *Ex parte Topping*, 34 L.J. Bky. 44; nor payment under a judgment in a defended County Court action: *Morgan v. Rowlands*, L.R. 7 Q.B. 493; nor payment by the defendant's wife on account where the evidence showed that the husband had expressly forbidden her to make any such payment: *Robertson v. McKernan*, 29 N.S.R. 315. The payment may be made by bill or note: *Turney v. Dodwell*, 3 E. & B. 136; and it operates from the delivery and not from the falling due of the bill: *Irving v. Veitch*, 3 M. & W. 90.

It is not necessary that money should pass if the transaction amounts to payment: *Maber v. Maber*, L.R. 2 Ex. 153; *House v. House*, 24 C.P. 526; see *Amos v. Smith*, 1 H. & C. 238.

If a payment of part is made as the whole amount due, it does not take the rest of the claim out of the statute: *Waugh v. Cope*, 6 M. & W. 824.

A payment made by a third person on account of the debt to the creditor cannot be appropriated by the latter so as to bar the statute: *Waller v. Lacey*, 1 M. & G. 54. Part payment can be proved by the oral admission of the defendant: *Cleave v. Jones*, 6 Ex. 573; but see S.C. 7 Ex. 421; or by his pleadings in Chancery: *Baldon v. Walton*, 1 Ex. 617.

Payment of interest by a devisee for life, on a simple contract debt of his testator is sufficient in an administration action to keep the debt alive against all persons entitled in remainder: *Re Hollingshead*, *Hollingshead v. Webster*, 37 Ch. D. 651.

Payment of interest by a principal on a specialty debt will prevent the bar applying to the liability of a surety: *Allison v. Frisby*, 43 Ch. D. 106; but not where the debt is on a note: *Paxton v. Smith*, 18 O.R. 178.

Where a payment is made by one of two joint debtors, with the knowledge and consent of the other, the operation of the statute in favor of the latter is not prevented: *Jackson v. Woolley* 8 E. & B. 783.

Where the defendant authorized an agent to offer plaintiff a part of the debt in discharge of the whole and the agent exceeded his authority and paid the sum offered in part discharge, it was held that it did not bar the statute: *Linsell v. Bonsor*, 2 N.C. 241. But, generally, payment by an authorized agent is payment by the principal, and the authority is a question for the jury: *Roscoe's N.P.* 653.

In order to render the crediting of an account against the plaintiff evidence of payment by him of so much on an account due to the plaintiff so as to take the case out of the statute, it must appear that the defendant clearly assented to its being considered a payment: *Bail v. Parker*, 39 U.C.R. 488; 1 A.R. 593.

An executor may, in his discretion, pay a debt barred by the Statute of Limitations: *Lewis v. Rumney*, L.R. 4 Eq. 451; *Alston v. Trollope*, L.R. 2 Eq. 205; but not after a judicial decision that it is not recoverable: *Midgley v. Midgley*, (1893) 3 Ch. 282.

Where part of plaintiff's own demands stated in his particulars are barred by the statute, he has a right to place against these the items of credit appearing in his particulars to be beyond six years: *Ford v. Spafford*, 8 U.C.R. 17.

A debtor unable to pay his debts from his own money, paid within three months of his being adjudged a bankrupt part of a debt barred by the Statute of Limitations, with the object of renewing the debt and enabling the creditor to prove in the bankruptcy for the balance due. The debt had always been treated by the debtor and the creditor as a subsisting debt, and one which it was intended should be ultimately paid. Held, that there was a sufficient part payment to take the debt out of the statute: *Re Lane, Ex parte Gaze*, 23 Q.B.D. 74.

Executors.—If a cause of action accrues after the death of a creditor the statute only commences to run on the appointment of an executor or administrator: *Grant v. McDonald*, 8 Gr. 468; *Atkinson v. Third Equitable Benefit Society*, 25 Q.B.D. 377; *Stevenson v. Hodder*, 15 Gr. 570; and interest is recoverable for the whole period from the time the cause of action arose: *Ib.*

The statute does not bar the claim of any executor against the estate of the testator: *Emes v. Emes*, 11 Gr. 325.

A person entitled to letters of administration of a deceased person may bring an action before obtaining such letters and prevent the Statute of Limitations from being a bar: *Trice v. Robinson*, 16 O.R. 433; *Chard v. Rae*, 18 O.R. 375.

Trustees.—The Statutes of Limitation apply now to any executors, administrators and trustees, except, (1) where the claim is founded upon any fraud or fraudulent breach of trust to which he was party or privy; (2) where the claim is to recover trust property, or the proceeds thereof, still retained by him or previously received by him and converted to his use: R.S.O. c. 129 s. 32. Where no existing Statute of Limitations applies, the trustee or person claiming under him, is at liberty to plead the lapse of time as a bar in like manner, and to the like extent, as if the claim had been in an action of debt for money had and received: *Ib.* Directors who by mistake or carelessness misapply money under their control belonging to the Company may, in the absence of fraud, rely on that section: *Re Lands Allotment Co.*, (1894) 1 Ch. 616. An action to compel trustees to replace moneys lost through breaches of trust is an action to recover money, and will be barred at the expiration of six years from the breach of trust, or six years from the time the interest of the plaintiff beneficiary became an interest in possession: *Re Bowden*, 45 Ch. D. 444; *Re Swain*, (1891) 3 Ch. 233; *Re Page*, (1893) 1 Ch. 304; *Re Somerset*, (1894) 1 Ch. 231.

An acknowledgment will take the case out of the statute but it must be an acknowledgment of a breach of trust and a liability of the trustee in consequence thereof: *Want v. Campaign*, 9 T.L.R. 254; *Stephens v. Beatty*, 27 O.R. 75; and, therefore, paying interest received from a mortgagor is not an acknowledgment of a liability for the insufficiency of the investment: *Re Somerset*, (1894) 1 Ch. 231; but payment by a solicitor as the agent of the trustees of moneys as interest on alleged investments will be sufficient: *Clark v. Bellamy*, 30 O.R. 532.

A tenant for life is barred at the expiration of six years: *Stewart v. Snyder*, 30 O.R. 110. A new trustee cannot recover from the old trustees for a breach of trust more than six years old, he not being a beneficiary within R.S.O. c. 129, section 32 (*b*); *Re Bowden*, 45 Ch. D. 444. As between trustees time does not begin to run until the liability is established, so that an action for contribution may be brought within six years from the judgment establishing the liability: *Robinson v. Harkin*, (1896) 2 Ch. 415.

Where trustees have paid out the trust money innocently although to a wrong person for a wrong purpose the Statute of Limitations will be a bar: *How v. Earl Winterton*, (1896) 2 Ch. 626; or where, though the breach of trust is fraudulent, if they derived no benefit from it and had no knowledge of and were not concerned in it: *Thorne v. Heard*, (1895) A.C. 495. If the trust money is "still retained" by the trustee the statute will not be a bar: R.S.O. c. 129, section 32. The expression "still retained" means actually in his hands or under his control: *Thorne v. Heard*, (1893) 3 Ch. 530, (1895) A.C. 495; or not accounted for: *Briggs v. Wilson*, 24 A.R. 521; *Briggs v. Freehold Loan and Savings Co.* 26 A.R. 232. Money lent by trustees to a mortgagor in breach of trust, is not converted by one of them, though paid in to a bank in which he is a partner, by the mortgagor in part discharge of a debt: *Re Gurney*, (1893) 1 Ch. 590.

The section will not protect a member of a firm where one partner has embezzled trust moneys, entrusted to the firm: *Moore v. Knight*, (1891) 1 Ch. 547.

Except where R.S.O. c. 129, s. 32, is applicable, no claim of a *cestui que trust* against his trustees for any property held on an express trust or in respect of any breach of such trust, is barred by any Statute of Limitations: R.S.O. c. 51, section 58, sub-section 1. See *Cook v. Grant*, 32 C.P. 511; *Coyne v. Broddy* 15 A.R. 159. And a claim against an agent of a trustee for money received by him with notice of the trust would not be barred: *Re Bell, Lake v. Bell*, 34 Ch. D. 462.

Infants.—Section 6 of R.S.O. c. 146 is similar to 9 Geo. IV. c. 14, s. 5, except that the latter statute does not authorize ratification by an agent.

Ratification of Contracts Made by Infants.—A ratification which by the statute is required to be in writing is a ratification of a promise or contract which if enforceable would result in a personal liability. An obligation entered into during infancy, if incident to property retained or benefits received after majority, may be ratified by acquiescence or inaction without writing, *e.g.*, a contract to take shares in a company may be ratified by retention of the shares after majority and executing a transfer thereof: *Re Constantinople and Alexandria Hotels Co.*, L.R. 5 Ch. 302. A covenant made by an infant on entering the service of an employer not to carry on the same business is ratified in equity by his continuing in the service for eighteen months after he became of age, and a new promise may be inferred: *Brown v. Harper*, 68 L.T. 488; *Cornwall v. Hawkins*, 26 L.T. 607, but giving written notice of intention to leave shortly after majority is not a ratification in writing within the statute: *Birkin v. Forth*, 33 L.T. 532.

A confirmation after majority of part of a marriage settlement is confirmation of the whole: *Davies v. Davies*, L.R. 9 Eq. 468; *Milner v. Harewood*, 18 Ves. 277; *Edwards v. Carter*, (1893) A.C. 360. Acceptance of rent after majority is confirmation of a lease made during infancy: *Smith v. Low*, 1 Atk. 489; and so would be a mortgage of the property referring to the lease: *Story v. Johnston*, 2 Y. & C. 586; *Lord Advocate v. Wemyss*, (1899) W.N. 124. Remaining after majority in possession of lands taken in exchange during infancy and afterwards disposing thereof is sufficient confirmation of the exchange: *Miller v. Ostrander*, 12 Gr. 349; see also Pollock on Contracts 5th ed. 52-73.

Care must be taken also to distinguish the cases where it has been said the infant is liable in equity for falsely representing himself to be of full age. The expression is only a compendious one which must be interpreted with reference to what were the functions of a Court of Equity. An infant who had induced trustees to pay money to him on his false representation as to age would not be allowed to plead his infancy as a bar to a release executed by him: *Overton v. Banister*, 3 Hare 503; and if he had obtained property on such representation, he might be ordered to redeliver it: *Clarke v. Cobley*, 2 Cox 173. But the representation does not amount to a contract, nor make the infant liable as on a contract, or for a debt, therefore an infant who obtains a lease by falsely representing himself of age is liable neither on the lease nor for use and occupation: *Lempriere v. Lange*, 12 Ch. D. 675.

Merely executing a contract, *e.g.*, a mortgage, does not amount to a misrepresentation of age: *Confederation Life Assn. v. Kinnear*, 23 A.R. 497.

135. No evidence of set-off shall be given by the defendant except such as is contained in the particulars of set-off delivered. R.S.O. 1887, c. 51, s. 129.

Evidence of
set-off.

Evidence of Set-Off.—The judge has, of course, power to amend the particulars: see section 124, and notes to section 98, *ante* p. 155. When anything required by the practice to be done by either party before or during the hearing, has not been done, the judge may adjourn the hearing to enable the party to comply with the practice: Rule 250.

Noncompliance with any of the rules does not render any proceeding void, but it may be set aside in whole or in part as irregular or amended or otherwise dealt with in such manner and upon such terms as the judge thinks fit: Rule 237.

The judge may, at any time, and on such terms as may seem just, amend any proceedings; and all such amendments may be made as may be necessary for the advancement of justice, determining the real question raised by the proceedings, and best calculated to secure the giving of judgment according to the very right and justice of the case: Rule 239; see also Rules 3 and 4.

Provisions
if set-off
exceeds
amount due
to plaintiff.

136. If the set-off, proved to the satisfaction of the Judge, exceeds the amount shown to be due to the plaintiff, the plaintiff shall be non-suited or the defendant may elect to have judgment for the excess, provided the excess be an amount within the jurisdiction of the Court, and if the excess be greater in amount than the jurisdiction of the Court the Judge may adjudicate that an amount of the set-off equal to the amount shown to be due to the plaintiff be satisfied by the claim but the adjudication shall be no bar to the recovery by the defendant in a subsequent action for the residue of the set-off. R.S.O. 1887, c. 51, s. 130.

Where Set-Off Exceeds Amount Due Plaintiff.—The court would be compelled under this section to determine the question of plaintiff's liability on the set-off to an amount beyond the jurisdiction. The section was passed to get over the difficulty created by the case of *Mead v. Creary*, 32 C.P. 1. Section 76 would apply the same rule to counterclaims. Where a cross claim by the defendant is really a set-off, though called a counterclaim the defendant is not entitled to costs as of a counterclaim, but only to the costs as of defence, namely, of the extra expense of trying the issues upon which he succeeds, if he does not succeed in extinguishing the plaintiff's claim in full: *Cutler v. Morse*, 12 P.R. 594; *Bennett v. White*, 13 P.R. 149; *Sanderson v. Ashfield*, 13 P.R. 230; *Meyers v. Defries*, 4 Ex. D. 180; *Stooke v. Taylor*, 5 Q.B.D. 569; *Abbott v. Andrews*, 8 Q.B.D. 648.

Judgment for the Excess.—If the balance is in favor of the defendant the judge may give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case as provided by this section: Rule 109. Under this rule it is not necessary that a separate judgment be entered for the plaintiff and defendant respectively, as in the case of cross-judgments, but the balance may be struck. This does not affect the question of costs, which would follow the event under section 213, and the plaintiff would be entitled to the costs of the claim and the defendant to the costs of the counterclaim: see *The C.P. Ry. Co. v. Grant*, 11 P.R. 208; *Barnes v. Bromley*, 6 Q.B.D. 695.

See notes to sections 75 and 76.

As to removal of cases to the High Court see R.S.O. c. 51, s. 186, and notes to section 76.

WITNESSES AND EVIDENCE.

Subpoenas.

Parties
may obtain
subpoenas
from clerk.

137. Any of the parties to an action may obtain, from the Clerk of any Division Court in the County, a subpoena with or without a clause for the production of books, papers and writings, requiring any witness, resident within the

Province or served with a subpœna therein, to attend at a specified Court or place before the Judge, or any arbitrator appointed by him under the provision hereinafter contained, and the Clerk, when requested by any party to an action, or his agent, shall give copies of such subpœna. R.S.O. 1887, c. 51, s. 131.

May Obtain.—Formerly it was necessary to issue a subpœna from the High Court in any Division Court suit when the party proposed to be subpoenaed resided outside the county. But under this action a subpœna may be obtained from any Division Court in the county in which the action is brought, for service on any witness residing within the province. For form of Subpœna: see Form 58. Formerly a witness, even if found in court, might refuse to be sworn unless subpoenaed: *Bowles v. Johnson*, 1 W. Bl. 36; but under section 139, every person in court must give evidence if called upon. It seems, however, that any witness is now entitled to be paid for his expenses and loss of time before giving evidence: *Re Workingmen's Mut. Society*, 21 Ch. D. 831.

It is very questionable whether or not the writ can be issued in blank: *Barber v. Wood*, 2 M. & Rob. 172; but see *Re Gerow v. Hoyle*, 28 O.R. 405.

The subpœna must name the place of trial: *Milson v. Day*, 3 M. & P. 333; and the parties to the cause: *Doe d. Clarke v. Thomson*, 9 Dowl. 948.

If notice of change of place is posted up at the place designated in subpœna, witness is bound to attend at the other place: *Chapman v. Davis*, 1 Dowl. N.S. 239.

It extends to the whole sittings if more days than one: *Scholes v. Hilton*, 10 M. & W. 15.

The names of all witnesses should be inserted in the original: *Mullett v. Hunt*, 1 C. & M. 752; and any number may be inserted in it: section 138.

It was held in *Comstock v. Harris*, 12 P.R. 17, that a witness ordinarily resident in a foreign country may be served here with a subpœna, and is liable for non-attendance. If the conduct money paid him is insufficient he must object at the time of the payment: but see *Connolly v. Dowd*, 18 P.R. 38, in which it was held that owing to the change in the rules, *Comstock v. Harris* is not now an authority, and a party residing out of the jurisdiction cannot be examined for discovery under subpœna and appointment.

It need not be personally served but may be left at the "usual place of abode" of the witness: section 139;—except perhaps for the purpose of bringing a witness into contempt (as to which see notes to section 103, *ante*), and for that purpose the original should be proved to have been shown to the witness: *Pitcher v. King*, 2 D. & L. 755; *Blakeley v. Blaase*, 12 P.R. 565; even if an attorney: *Smith v. Truscott*, 3 M. & G. 267; but in any case if the witness requires to see it a reasonable time afterwards (see notes to section 123), and is refused, service is defective: *Westley v. Jones*, 5 Moore, 162. The copy must in all cases be left with, and not merely shown to, the witness: *Thorpe v. Gisborne*, 11 Moore, 55, *Re Holt*, W. N. (1879) 48; and there must be no mistake in the day: *Doe d. Clarke v. Thompson*, 9 Dowl. 948. Service is not effective without the necessary witness fees being paid or tendered: *Fuller v. Prentice*, 1 H. Bl. 49. The fees include expenses of going to, staying at, and returning from the trial: *Id.*; *Newton v. Harland*, 1 M. & G. 956; also see *Tariff of Witness Fees*. If the attendance of the witness becomes unnecessary by settlement of the case or otherwise, and he is informed of it before expenses incurred, the sum may be recovered back: *Martin*

v. Andrews, 7 E. & B. 1. The fees are fixed by tariff, and no distinction can properly be made in Division Courts in amount as to any class of witnesses, except under section 140. If a larger sum than what a witness is entitled to is *bona fide* demanded, he will not be brought into contempt: Newton v. Harland, *supra*. If a party refuse money tendered him, saying he will pay his own expenses, he is subject to the same consequences as if paid: Gough or Goff v. Miller or Mills, 2 D. & L. 23. The fee need not be tendered to the witness at the time of service; a reasonable time before the sittings is sufficient: Webb v. Page, 1 C. & K. 23. Where a witness had been brought to the place of trial by one party, the other, finding him there, subpoenaed him, it was held that without tender of expenses he could do so: Edmonds v. Pearson, 3 C. & P. 113; and that the witness could not refuse to be cross-examined on that account: *Id.* In a later case, however, it was held that the party calling him was bound to pay all his expenses: Allen v. Yoxall, 1 C. & K. 315. Service must be made a reasonable time before the trial: Barber v. Wood, 2 M. & Rob. 172. What is reasonable must depend on the circumstances of each case: Maunsell v. Ainsworth, 8 Dowl. 80; and is in all cases a question for the court: Barber v. Wood, *supra*. If notice is given witness that cause not yet tried, he is bound to attend, though *after* the day mentioned in subpoena: Davis v. Lovell, 4 M. & W. 678; but see Grantham v. Bishop, 1 C.P. 237; though not sufficient to bring him into contempt: Alexander v. Dixon, 1 Bing. 366. Service may be made any hour of the day or night, but not on Sunday: R. v. Leominster, 2 B. & S. 391, and cases cited. If the witness be a married woman, the money should be tendered her, and not her husband: Arch. Prae, 12th ed. 351. A witness may also maintain an action for his fees against the party who subpoenaed him, though he refuses to give evidence because such fees are not paid him, and he was thereupon not examined: Hallet v. Mears, 13 East, 15; Pell v. Daubeny, 5 Ex. 955. The solicitor is not responsible unless he agreed to be: Robins v. Bridge, 3 M. & W. 114. A witness should be served a reasonable time to allow him to put his affairs in order: Hammond v. Stewart, 1 Str. 510; but urgent domestic business is no excuse: Gough or Goff v. Miller or Mills, 2 D. & L. 23. A summons may be served in a court of justice on a party subpoenaed to give evidence in his own cause: Poole v. Gould, 1 H. & N. 99. Difficulty in serving does not dispense with the necessity of service: Barnes v. Williams, 1 Dowl. 615. If witness paid by both parties, neither can recover it back: Crompton v. Hutton, 3 Taunt. 230. A party to a cause, *about to attend the trial* on his own account, has no right to conduct money or expenses when subpoenaed by the other side: Reed v. Fairless, 3 F. & F. 958. A party to a cause is not entitled to his fees as a witness unless he expressly attended to give evidence on his own behalf, and not to superintend the cause: Howes v. Barber, 18 Q.B. 588, and the affidavit of disbursements should distinctly show that fact. It is not a general rule in England that parties, if witnesses, are to have an allowance for their attendance on their own behalf: Dowdell v. Australian Royal Mail Steam Nav. Co., 3 E. & B. 902. A witness should be called on his subpoena: R. v. Stretch, 3 A. & E. 503; Dixon v. Lee, 3 Dowl. 259. But if it can be shown he did not attend it is sufficient: Goff v. Mills, 2 D. & L. 23. It is a sufficient excuse that he was too ill to attend: *Re Jacobs*, 1 H. & W. 123; Scholes v. Hilton, 10 M. & W. 15; but it is no excuse that he would have been in time if a previous cause on the list had not unexpectedly gone off: R. v. Fenn, 3 Dowl. 546; and that another person had answered for him and would have fetched him in a few minutes. Before proceedings for contempt can be taken, it must appear that he was a material witness: Tinley v. Porter, 2 M. & W. 822. To sustain an action against witness, if party cannot proceed with trial, it is sufficient without calling jury or otherwise entering on the trial: Lamont v. Crook, 6 M. & W. 615. If a witness has received full fees from one side, and,

when served with subpoena on the other, consents to receive a nominal sum, he is still liable to the latter if he does not attend: *Betteley v. McLeod*, 3 Bing. N.C. 405, but actual damage must be shown in any case: *Couling v. Cox*, 6 C.B. 703; *Yentman v. Dempsey*, 9 C.B.N.S. 881.

No privilege attaches to telegrams in the possession of a telegraph company, and when a telegraph operator was subpoenaed to produce certain telegrams which, upon his examination, he stated had been burnt in accordance with instructions received from the general manager of the company it was held that the manager and operator were guilty of a contempt of court: *Re Dwight and Macklem*, 15 O.R. 148. The operator was the proper person to subpoena to produce the telegrams, as he had control of them and ability to produce them: *Id.* The manager of a chartered bank is not privileged under the Bank Act from giving evidence as to a customer's account or from producing the bank's books: *Hannum v. McKee*, 18 P.R. 185; see *Parnell v. Wood*, (1892) P. 137.

Privilege from arrest.—A witness going to or returning from a trial is privileged from arrest on civil process: *Montagu v. Harrison*, 3 C.B. N.S. 292; *Atty.-Gen. v. Leathersellers Co.*, 7 Beav. 157; but not from an arrest on criminal process: *Lord Wellesley's Case*, 2 Rus. & Myl. 639; or for contempt of court: *Re Freston*, 11 Q.B.D. 545 at p. 556.

A warrant for the arrest of a witness issued by a justice in default of distress for non-payment of rates is civil process, and the court, before which the witness is to appear or has appeared, may order his discharge: *Hoborn v. Fowler*, 9 T.L.R. 6.

Witness in Gaol.—A writ of *habeas corpus* may be obtained for the attendance of a witness who is confined in prison. The party requiring him will, however, be ordered to pay all expenses: *Spellman v. Spellman*, 10 C.L.T. 20.

Hostile Witness.—A hostile witness is one who, from the manner in which he gives his evidence, shows that he is not desirous of telling the truth to the court: *Coles v. Coles*, L.R. 1 C.P. 70. A person whose evidence turns out to be unfavorable to the party calling him, is not, therefore, an "adverse witness;" he must, in the opinion of the judge, be adverse in the sense of showing a hostile mind: *Greenough v. Eccles*, 5 C.B.N.S. 786.

A witness who, in the opinion of the judge, proves adverse, may be contradicted by other evidence, or, by leave of the judge, an inconsistent statement made at other times may be proved, but the circumstances of such statement sufficient to designate the particular occasion must be mentioned to the witness, and he must be asked whether or not he made such statement: R.S.O. c. 73, section 20. The discretion of the judge, at the trial, is absolute and cannot be reviewed: *Rice v. Howard*, 16 Q.B.D. 681.

Where a surgeon had given a certificate of serious injury to a plaintiff and on being called by him contradicted it, and alleged it to be collusively given, he was allowed to be treated as adverse: *Martin v. Travellers' Ins. Co.*, 1 F. & F. 505. And where a witness had given a different statement to the party's solicitor, he was allowed to be treated as adverse, but only with a view to discredit him generally: *Faulkner v. Brine*, 1 F. & F. 254; *Amstell v. Alexander*, 16 L.T. 830. But section 20 of R.S.O. c. 73, is not intended to apply to the loose statements made with a view to prepare the evidence: *Reed v. King*, 30 L.T. 290.

Although a witness may disprove the case of the party calling him, it may nevertheless be proved by other witnesses, such witnesses not being called to discredit him, but to contradict him on the material facts: *Ever v. Ambrose*, 5 D. & R. 629; *Friedlander v. London Assurance*, 4 B. & Ad. 193. A party calling an adverse litigant cannot cross-examine him

without the leave of the judge: *Price v. Manning*, 42 Ch. D. 372. See also *Coles v. Coles*, L.R. 1 P. & D. 70; *Bradley v. Richards*, 8 Bing. 57.

Production of Books, etc.—This is called a *duces tecum*. A witness called to produce a document need not be sworn; nor unless made a witness in the ordinary way can he be cross-examined: *Perry v. Gibson*, 1 A. & E. 48; and if sworn by mistake the same rule applies: *Rush v. Smith*, 1 C.M. & R. 94. It is incumbent on the party to bring the "books, papers, and writings" with him, and if he does not he is *prima facie* in default: *Amey v. Long*, 9 East, 473. Having a lien on them was held no excuse for not producing them: *Thompson v. Mosley*, 5 C. & P. 501, *sed quare*; see *Kemp v. King*, 2 Moo. & Rob. 437; *Doe v. Ross*, 7 M. & W. 102; *Ex parte Paine & Layton*, L.R. 4 Ch. 215; nor can he show that the document was not material: *Doe v. Kelly*, 4 Dowl. 273. If a witness who is sworn has a document with him in court, he is bound to produce it, though not served with a *subpoena duces tecum*: *Snelgrove v. Stevens*, Car. & M. 508; *Farley v. Graham*, 9 U.C.R. 438. A servant cannot be brought into contempt for not producing books and papers of his master in his possession, which the master will not allow him to bring: *Crowther v. Appleby*, L.R. 9 C.P. 23, and cases cited; but see *Hannum v. McRae*, 17 P.R. 567; 18 P.R. 185; see *Re Emma Silver Mining Co.*, L.R. 10 Ch. 194. The remarks made in the previous note have application here also. As to corroboration of witness, see *Findley v. Pedan*, 26 C.P. 483; and recalling him, which is in the discretion of the judge: *Gleason v. Williams*, 27 C.P. 93.

Inspection of Documents.—When, in any action or matter, any party thereto is desirous of inspecting any document in which he has an interest, and which shall be in the possession, power, or control of any other party, he may, within four days from the day of the service of the summons, give notice to such other party, by prepaid and registered post letter, or otherwise, that he desires to inspect such instrument, at any place to be appointed by such other party, and being within the division in which the suit is brought, and such other party shall appoint a place accordingly; but if he neglects or refuses to appoint such place, or to allow the party giving the notice, or his solicitor or agent, to inspect it within three days, from the day of receiving such notice, the judge may, in his discretion, on the day of hearing, exclude such document from being given in evidence in such action or matter, or adjourn the cause for the purpose of such inspection, and make such order as to costs as he shall think fit: Rule 287.

This rule is taken from old Rule 137, which, however, provided only for the inspection by the defendant of any deed, bond, or other instrument or writing which was in the possession, power, or control of the plaintiff. This rule extends to all documents, and gives to the plaintiff a right to inspect any document in the possession, power, or control of the opposite party.

Within Four Days.—It is difficult to see why the time for giving notice of the desire to inspect should be limited to four days from the service of the summons. No power is given to extend the time, and, unless notice is given within four days, neither party can obtain inspection under this rule. Under Rule 257, an order may be made for the inspection of any property or thing being "the subject of the action or matter." The day of service of the summons would be excluded in the computation of the four days.

Give Notice.—Notice may be given in the manner prescribed by Rule 241. If the defendant has not filed any notice of defence, and the plaintiff desires to inspect any documents in his possession, the plaintiff would, it is submitted, send the notice by letter at his peril of directing

the same to the proper address. If there should be any doubt about the address, the only safe way would be to serve it personally. If given by letter, the service would count from the mailing, if within the four days.

The party required to produce the documents for inspection must, within three days from the date of receiving the notice, appoint a place within the division in which the suit is brought for the inspection. If the notice were not received, there would be no power to give a new notice after the expiration of the four days, or to exclude the document from being given in evidence. If a place should be appointed, it would seem that the document would have to be left at such place for an indefinite time, to allow the party giving the notice to inspect the same. It would have been more convenient to have provided, as in C.R. 470, that the notice appointing the place should also name a time at which the document might be inspected.

Exclude all Documents.—No power is given to the judge to order the production of the document for inspection in the event of no place being appointed, unless the document should fall within Rule 257. Such a power is conferred in the High Court under C.R. 471. Should such a document be necessary for the proof of the case of either party, the production thereof could be enforced only by subpoena to produce it at the trial.

Privileged Communications.—Certain documents are privileged from production. Without making any attempt at being exhaustive, the following examples may be referred to:

(1) Communications between solicitor and client: "The law as to privileged communications between solicitor and client is very clearly expressed in *Gardner v. Irvin*, 4 Ex. D. 49: 'It is not sufficient for the parties to say that the letters are correspondence between a client and the solicitor. The letters must be professional communications of a confidential character for the purpose of getting legal advice.' Letters are not necessarily privileged because they pass between solicitor and client. In order to be privileged there must be a professional element in the correspondence": *per Lindley, L.J.*, *O'Shea v. Wood*, (1891) P. 286, at p. 289. Letters written by a clerk to the client containing references to advice given by the client's solicitor, whom the clerk has consulted, are privileged: *Boughton v. Citizens Ins. Co.*, 11 P.R. 110. Should the solicitor, unknown to the client, have ceased to practice as such, when the communications are made, they will nevertheless be privileged: *Colley v. Richards*, 19 Beav. 401.

The following have also been held to be privileged communications: Confidential communications between solicitor and client: *Minet v. Morgan*, L.R. 8 Ch. 361. Information obtained by the client for the purpose of obtaining his solicitor's opinion thereon: *Southwark and Vauxhall Water Co. v. Quick*, 3 Q.B.D. 315. Information voluntarily given by a third person to the solicitor: *Young v. Holloway*, 12 P.D. 167. The draft of a witness's evidence prepared by a solicitor for insertion in counsel's brief: *Taylor on Evi. s. 932, n.* A letter written before action, by the solicitor of the defendant to the plaintiff's solicitor, is not receivable in evidence to prove a fact in issue: *McBride v. Hamilton Prov. & Loan Society*, 29 O.R. 161.

A statement in an affidavit on production that a certain letter from a firm of solicitors to the deponent was a communication between solicitor and client and was privileged, was held to be sufficient to protect the document from production by way of discovery: *Hamelyn v. Whyte*, 6 P.R. 143, followed but doubted in *Hoffman v. Crerar*, 17 P.R. 404.

Letters passing between the manager of a branch of a chartered bank, and the manager of another branch of the same bank, were held to be

privileged communications: *Van Valkenburg v. Bank of B. N. A.*, 5 B.C.R. 4, following *Anderson v. Bank of British Columbia*, 2 Ch. D. 644.

A party himself is not bound to disclose matters as to which his information is derived from privileged communications, the matters not being merely statements of fact patent to the senses: *Kennedy v. Lyell*, 23 Ch. D. 387; 9 App. Cas. 81.

(2) Documents relating exclusively to the party's own title or case, or to the evidence by which it is to be established, and not relating also to the title or case of the opposite party.

(3) Documents irrelevant to the questions in the action.

(4) Documents tending to criminate the party: *Webb v. East*, 5 Ex. D. 23, 108; or where the disclosure sought would subject the party to a penalty: *Whitaker v. Izod*, 2 Taunt. 115; *Hall v. Gowanlock*, 12 P.R. 604; but not unless the party from whom disclosure is sought will pledge his oath to the best of his belief that the production would tend to criminate him: *Webb v. East*, 5 Ex. D. 108.

(5) Documents relating to the public service: *Bradley v. McIntosh*, 5 O.R. 227. See R.S.O. c. 73, s. 27.

(6) That portion of a document containing the names of a party's witnesses: *Armstrong v. Toronto Ry. Co.*, 15 P.R. 208; but the report itself, unless obtained for the purpose of submission to a solicitor, for the purpose of being laid before him for advice, or in view of anticipated or threatened litigation, or after litigation commenced, would not be privileged: *Betts v. The G. T. Ry. Co.*, 12 P.R. 86.

Documents Not Privileged.—The following are examples of cases in which documents were held not to be privileged communications: Letters passing between a trustee and his solicitor, relating to the trust before action brought, are not privileged as against the *cestui que trust*: *Re Mason*, 22 Ch. D. 609; *Re Postlethwaite*, 35 Ch. D. 722. Communications made to a solicitor by his client before the commission of a crime for the purpose of being guided or helped in the commission of it: *R. v. Cox*, 14 Q.B.D. 153. The evidence of solicitors as to statements made to them, by a person in his lifetime, as to his intentions with regard to land, made in the solicitor's office, in the presence of another person not a solicitor, and which was not followed by professional employment: *Rudd v. Frank*, 17 O.R. 758. A communication made by one of the solicitors in an action, to an arbitrator in the same action: *Connec v. The C.P. Ry. Co.*, 9 C.L.T. 36. A transcript of a shorthand note of evidence and arguments taken at a reference: *Rawstone v. Preston Corp.*, 30 Ch. D. 116; or notes of proceedings in open court: *Nicholls v. Jones*, 2 H. & M. 588; *Robson v. Worswick*, 38 Ch. D. 370. Telegrams in the possession of a telegraph company, and received for the purpose of transmitting them in the usual course of business: *Re Dwight v. Macklem*, 15 O.R. 148. The books of a chartered bank showing the customer's balance, when relevant to the issue: *Hannum v. McRae*, 18 P.R. 185; see also *Crowthier v. Appleby*, L.R. 9 C.P. 23; *Atty.-General v. Wilson*, 9 Sim. 526. Photographs by which a person might be identified in an action in which the identity of such person was disputed were held to be "documents" and not privileged: *Fox v. Sleeman*, 17 P.R. 492.

Joint Possession.—Documents which are in the joint possession of a party and some person not a party to the action, cannot be ordered to be produced: *Kearsley v. Phillips*, 10 Q.B.D. 465; *Kettlewell v. Barstow*, L.R. 7 Ch. 686; but if there is no interest which could be affected by their production other than the interest of the parties to the action they will be ordered to be produced: *London & Yorkshire Bank v. Cooper*, 15 Q.B.D. 473.

As to service and affidavit of service of subpoena. See notes to section 116.

Setting Aside Subpoena.—A subpoena *duces tecum* requiring the production of irrelevant document will be set aside as oppressive: *Steele v. Savory*, W. N. (1891) 195; 8 T.L.R. 94; see *Hannum v. McKee*, 17 P.R. 567; 18 P.R. 185.

Absence of a material witness is a ground for the adjournment of the action: Rule 281.

138. Any number of names may be inserted in a subpoena, and service thereof may be made by any literate person, and proof of the due service thereof, together with the tender or payment of expenses, may be made by affidavit, and proof of service may be received by the Judge, either orally or by affidavit. R.S.O. 1887, c. 51, s. 132.

Service of
subpoena,
by whom
made.

Any Literate Person.—See notes to sections 103 and 116 as to mode of service and by whom served, and also notes to section 137.

Proof of Due Service.—As to proof of service see notes to section 103.

Payment of Expenses.—These are regulated by the tariff. The Division Court tariff prescribes the limit of allowances to all classes of witnesses resident in the county: *Dartnell v. The Sessions of Prescott and Russell*, 26 U.C.R. 430. For expenses of witnesses out of the county see section 140.

Public officials subpoenaed to produce any public or other document are only entitled to ordinary witness fees, R.S.O. c. 51, section 120.

Affidavit of Disbursements.—The clerk shall determine (subject to appeal to the judge) what number of witnesses shall be allowed on taxation of costs; the allowance for whose attendance shall be according to the scale, and before allowing disbursements to witnesses the clerk shall be satisfied that the witnesses attended and that the claim for fees is just, and he may and, in case of dispute, shall require the party whose bill of costs is being taxed to furnish an affidavit of disbursements: Rule 291. The clerk should tax the costs where practicable on the day on which the action or matter is tried: see Rule 174 and notes to section 47.

The clerk is bound to require an affidavit of disbursements only in cases of dispute. He may, however, require the same in any case. No fees should be allowed for any witness who did not actually attend the court. Where it is necessary to keep witnesses in attendance more than one day, the fees for such attendance should be taxed: *Alexander v. School Trustees of Gloucester*, 11 P.R. 157. Witnesses called to establish something on which the party calling them failed may be disallowed: *Latour v. Smith*, 13 P.R. 214. The expenses of a witness whose testimony is clearly inadmissible, or whose testimony would not have supported any issue in the case, will not be allowed; but where a large number of witnesses were subpoenaed upon matters which were not gone into at the trial, and therefore the witnesses were not called, but it was shown by counsel's brief what each witness was to be called for, and was expected to prove, and it was sworn that the witnesses were necessary and material witnesses, and were subpoenaed in good faith to substantiate the charges made, it was held that their witness fees should be taxed: *Re Prescott Election Case*, 32 U.C.R. 303.

False Affidavit of Disbursements.—Where a party has falsely sworn that witnesses have been paid, and the same are taxed to him and paid to him, he will be ordered to refund the amount: *Hornick v. Township of Romney*, 11 C.L.T. 329; *Harding v. Knust*, 15 P.R. 80.

Professional Witnesses.—Disbursements to surveyors, architects and professional witnesses, such as are entitled to specific fees by statute, are to be taxed as authorized by such statute. Land surveyors are entitled to \$5 a day in addition to travelling expenses: R.S.O. c. 180, s. 40; and architects are entitled to the same allowance as land surveyors: R.S.O. c. 182, s. 28. The fees of all other professional men are provided for in the tariff: Form 3.

No certificate is now required from the judge of the professional character of the evidence, such as was provided for by 57 Vic. c. 25; see 59 Vic. c. 18, schedule (20). See also C.R. 1151.

Penalty for
disobeying
subpœna or
refusing to
be sworn.

139. Every person served with a copy of a subpœna either personally or at his usual place of abode, and to whom at the same time a tender of payment of his lawful expenses is made, who refuses or neglects without sufficient cause to obey the subpœna, and also every person in Court called upon to give evidence, who refuses to be sworn (or affirm where affirmation is by law allowed) or to give evidence, shall pay such fine not exceeding \$8 as the Judge may impose, and shall, by verbal or written order of the Judge, be, in addition, liable to imprisonment for any time not exceeding ten days; and the fine shall be levied and collected with costs, in the same manner as fines imposed on Jurymen for non-attendance, and the whole or any part of the fine, in the discretion of the Judge, after deducting the costs, shall be applicable toward indemnifying the party injured by such refusal or neglect, and the remainder thereof shall form part of the Consolidated Revenue Fund. R.S.O. 1887, c. 51, s. 133.

Usual Place of Abode.—See notes to sections 84 and 105. The service need not be personal but it is better that it should be so wherever possible. Personal service is generally necessary when it is sought to charge the person served with contempt: see notes to section 137. Neglect or refusal without just cause to obey the subpœna would be punishable as this section directs in every case where the requirements of the section have been complied with. The service should be a reasonable time before the sittings so as to allow the witness an opportunity of making preparation, either in his business affairs or otherwise, to attend court. He would not be treated as in contempt if it appeared that such was not done.

Lawful Expenses.—See notes to section 138.

Sufficient Cause.—What is sufficient cause must depend on the circumstances of each case: see notes to section 117.

Every Person in Court.—Any person in court may be called upon to give evidence. But if a person were subpœnaed and not paid his witness fees, and attended notwithstanding, he could not be called upon to give evidence by the party who had not subpœnaed him, unless such witness fees were first paid: see *Re Working Men's Mut. Society*, 21 Ch. D. 831, cited in note to section 137, *ante* p. 245.

Service of a subpœna is only necessary to compel attendance, and does not affect the right of a witness to his fees nor the right of a party who

called him, if successful and costs allowed, to tax them against his opponent: *Fox v. Nippissing Ry. Co.*, 7 P.R. 157.

To be sworn (or affirm), etc.—"All witnesses ought to be sworn according to the peculiar ceremonies of their religion, or in such manner as they deem binding on their consciences;" Taylor on Evi. 8th ed. 1179; and if the oath be dispensed with it can only be by authority of an Act of Parliament: *Maden v. Catenach*, 7 H. & N. 360; *Ormichund v. Barker*, 1 Smith's, L.C. 7th ed. p. 455; *Miller v. Solomons*, 7 Ex. 534, 538; see *R. v. Moore*, 61 L.J.M.C. 80.

As to forms of oaths see Form No. 41 and Rule 269.

In *R. v. Pah-Mah-Gay*, 20 U.C.R. 195, on a trial for murder, an Indian witness was offered, and on his examination by the judge it appeared that he was not a Christian, and had no knowledge of any ceremony in use among his tribe binding a person to speak the truth. It appeared, however, that he had a full sense of the obligation to do so, and that he and his tribe believed in a future state, and in a Supreme Being, who created all things, and in a future state of rewards or punishment according to their conduct in this life; it was held that his evidence was admissible.

As to competency of witnesses, see R.S.O. c. 73, ss. 2-11.

As to where affirmation is by law allowed, and forms of affirmation, see R.S.O. c. 73, ss. 12-15.

Not Exceeding Ten Days.—The fine for contempt under this section is not to exceed \$8. It may be imposed by verbal or written order. In addition to the pecuniary penalty, imprisonment may be imposed for a time not exceeding ten days. The amount of the fine after deducting the costs may be made applicable towards indemnifying the party injured by such neglect or refusal.

In *Re Pollard*, L.R. 2 P.C. 120, it is laid down that, "no person should be punished for contempt of court, which is a criminal offence, unless the specific offence charged against him be distinctly stated, and an opportunity of answering it given to him." At page 325 of Maxwell on Statutes, it is said that, "in giving a judicial power to affect prejudicially the rights of person or property, a statute would be understood as silently implying, when it did not expressly provide the condition or qualification, that the power was to be exercised in accordance with the rule of natural justice, that the person liable to be prejudicially affected should first have an opportunity of defending himself;" see also *Thorburn v. Barnes*, L.R. 2 C.P. 384; *Bullen v. Moodie*, 13 C.P. 126, and 2 E. & A. 379; *Nicholls v. Cumming*, 1 S.C.R. 395. As to order for imposition of fine, and the entry to be made by clerk, see Forms 93 and 94.

Subpenas on Appeals Under Statutes.—Subpœnas may be issued by the clerk under the seal of the court in cases of appeal under the Master and Servants' Act, the Act respecting Line Fences, and the Act respecting Ditches and Watercourses, and the bailiff may serve the same: Rules 319, 324, 333. The rules under the Act respecting Ditches and Watercourses are now inapplicable, however, owing to the change in procedure under the Act of 1894, now R.S.O. c. 285, ss. 25, 26. The clerk's and bailiff's fees for service under these Acts are the same as those provided for in the case of suits in court: Rules 318, 325, 334.

Appeals Under The Consolidated Assessment Act.—Rule 309 provides that the rules regulating the practice in appeals under the Ditches and Watercourses Act, in so far as the same are applicable, and the practice is not provided for by the said Consolidated Assessment Act, shall govern appeals under the said last mentioned Act on appeals from Courts of Revision. There does not seem to be any rules relating to ditches and

watercourses applicable to appeals under The Assessment Act, unless it be the rule relating to the issue of subpoenas. The clerk of the municipality, who is clerk of the court sitting on appeal, has no power to issue subpoenas. That power is given to the clerk of the County Court: R.S.O. c. 224, s. 75 (8). The board of county judges had no power to make Rule 333. It would seem also that Rules 308 and 309, are *ultra vires*, but even if *intra vires*, they are practically useless.

Expenses
to be paid
witness out
of county.

140. Any person served with such subpoena, who is resident in Ontario, but out of the County in which the Division Court is situate, shall be entitled to be paid witness fees and mileage according to the County Court tariff. R.S.O. 1887, c. 51, s. 134.

Served With Such Subpoena.—The allowance to all classes of witnesses is now regulated by the scale laid down in the tariff: Rule 291; and this section may now be considered as not in force.

Commission to take Evidence.

Power to
issue com-
missions
to take
evidence.

141. In case the plaintiff or defendant in an action in a Division Court is desirous of having at the trial thereof the testimony of a person residing without the limits of the Province, the Judge of the County Court of the County wherein the action is pending, may, upon the application of the plaintiff or defendant, and upon hearing the parties, order the issue of a commission out of and under the seal of the Division Court to a Commissioner to take the examination of such person. R.S.O. 1887, c. 51, s. 135; 52 V. c. 12, s. 13.

Residing Without the Province.—As to the meaning of the word “residing” see notes to section 84 p. 133, *supra*. See also notes to section 87.

Application for Commission to Take Evidence.—The application should be made as soon as some issue is raised which must be tried, if the action be tried at all: *Smith v. Greely*, 11 P.R. 38.

It should be made a reasonable time after defence put in: *Brydges v. Fisher*, 4 M. & Sc. 458; and if made for the purpose of delay will be refused: *Lloyd v. Key*, 3 Dowl. 253; *Temperance Colonization Socy. v. Evans*, 7 C.L.T. 46; or the defendant may be ordered to pay money into court: *Sparks v. Barrett*, 5 Scott, 402. Neither party is absolutely entitled to a commission. It is a matter of judicial discretion, and ought only to be granted on reasonable grounds being shown for its issue. The court must take care, on the one hand, that it is not granted when it would be oppressive or unfair to the opposite party, and, on the other hand, that a party has reasonable facilities for making out his case when from the circumstances, there is a difficulty in the way of witnesses attending the trial: *Coch v. Allecock*, 21 Q.B.D. 178; *Lewis v. Kingsbury*, 4 T.L.R. 626, 639. A plaintiff who desires to be examined himself must make out a strong *prima facie* case why he should not attend and be examined at the trial: *Light v. Anticosti Co.*, 58 L.T. 25; but the court is more favorable to an application by a defendant resident abroad: *Ross v. Woodford*, (1894) 1 Ch. 38; and the fact that the defendant after the service of the summons but before it was known when the trial would take place was within the jurisdiction for the purpose of settling the action is not

such a special circumstance as will disentitle him to a commission: *New v. Downs*, 64 L.J.Q.B. 104; and the fact that the defendant is afraid to return is no ground for refusal: *Mills v. Mills*, 12 P.R. 473.

The application should be on notice: *Doe v. Pattison*, 3 Dowl. 35; *Holmes v. The C.P. Ry. Co.*, 5 Man. L.R. 245.

An application to take evidence in criminal cases may be made at any time after information laid, and the evidence taken under it may be used at any stage of the enquiry: *R. v. Verral*, 17 P.R. 61.

Affidavit for Commission.—The affidavit should usually show: (1) The names of the witnesses to be examined: *Herman v. Lawson*, 3 B.C.R. 353; or at least the name of one witness. When no names were given in the affidavit, on the ground that if their names were mentioned the witnesses would be spirited away, the order for commission granted thereon was set aside: *Howard v. Dulari*, 11 T.L.R. 451. (2) That the evidence to be obtained is material to the issue, and that there is some good reason why the witness cannot appear at the trial: *Kidd v. Perry*, 14 P.R. 634; *Langen v. Tate*, 24 Ch. D. 522; *Lawson v. Vacuum Brake Co.*, 27 Ch. D. 137; *Armour v. Walker*, 25 Ch. D. 673; *Coeh v. Alcock*, 21 Q.B.D. 178; *The Parisian*, 13 P.D. 16; *Fraser v. Nevins*, 4 T.L.R. 448. (3) That the application is made *bona fide*, and not for the purposes of delay: *R. v. Boyse*, *Crofton v. Crofton*, 20 Ch. D. 760; see *Ross v. Woodford*, (1894) 1 Ch. 38; *per Cotton, L.J.*; *Langen v. Tate*, 24 Ch. D. 522, at p. 528. When a witness is travelling abroad it should be shown that he will remain at the place to which the commission is directed long enough to allow of its due execution: *Singer v. Williams Manfg. Co.*, 8 P.R. 483.

It need not appear that any effort was made to obtain the attendance of the witness: *Norton v. Melbourne*, 3 Bing. N.C. 67; or that the defence is true: *Westmoreland v. Huggins*, 1 Dowl. N.S. 800. It is no conclusive answer that there are witnesses within the jurisdiction who can swear to the same facts: *Adams v. Corfield*, 28 L.J. Ex. 31. It is safer where any injustice to other parties, in the way of delay or expense, or otherwise, can be provided against, to favor the granting rather than the refusing of the application; the main considerations are a full and fair trial and the saving of expense: *Robins v. Empire Ptg. Co.*, 14 P.R. 488. Where a strict cross-examination is necessary of an interested witness, and it cannot be had, according to the law of the country where the commission is to be executed, the court will refuse the application: *R. v. Boyse*, *Crofton v. Crofton*, 20 Ch.D. 760; and a commission to examine a plaintiff in New Zealand, was granted on the condition that his depositions should not be read at the trial, if the defendant required him to appear at the trial to be examined and cross-examined: *Nadin v. Bassett*, 25 Ch.D. 21; but if it is desired to impeach the veracity of a witness by general testimony, this can be done at the trial, and it is no ground for refusing the application: *Nordheimer v. McKillop*, 10 P.R. 246; and the mere fact that the witness fears cross-examination, is no answer: *Carruthers v. Graham*, 9 Dowl. 947; but if the witness is interested, and the application is made solely to avoid cross-examination at the trial, the application will be refused: *Berdan v. Greenwood*, 20 Ch.D. 764 (note); *Armour v. Walker*, 25 Ch.D. 673. Experts should not be examined on commission: *Russell v. The G.W. Ry. Co.*, 3 U.C.L.J. 116; *Atty.-Genl. v. Gooderham*, 10 P.R. 259; not even of lawyers, as to a question of foreign law, unless competent men cannot attend without difficulty, or there will be a saving of expense: *The Moxham*, 1 P.D. 107, 116.

A party desiring a commission for his own examination outside the jurisdiction, should himself make an affidavit of the facts relied on: *Tollmachs v. Hobson*, 5 B.C.R. 216.

For form of affidavit see Form 264.

Order for Second Commission.—If the first commission proves abortive, a second will be ordered: *Fisher v. Izataray*, E. B. & E., 321; and also where the witness admits that he did not fully disclose the facts on the first commission: *Rogers v. Manning*, 8 P.R. 2. In *Crowther v. Nelson*, 7 T.L.R. 653, Wills, J., said: "It is a very unusual thing to grant a second commission, and it ought never to be allowed except upon substantial grounds." An order for a second commission was granted on terms as to payment of costs: *Gill v. Ellis*, 5 B.C.R. 137.

And commissions were granted for the examination of witnesses in three different places concurrently: *Western Bank of New York v. Koppel*, 8 T.L.R. 36, 286.

Requisites of Commission.—Where a single commissioner is appointed, the commission should authorize him to administer the oath to himself: *Wilson v. DeCoulon*, 22 Ch. D. 841. The names of the witnesses should be mentioned in the commission: *Nadin v. Bassett*, 25 Ch. D. 21.

For form of commission see Form 280.

In some cases involving intricate questions of fact the evidence will be ordered to be taken *via voce*: *Watson v. McDonald*, 8 P.R. 354.

The commission should be taken out promptly. If it is not, the depositions might not be received in evidence: *Ponsford v. O'Connor*, 5 M. & W. 673; see *Watts v. Anderson*, 5 Man. L.R. 291.

A copy of the interrogatories should be annexed to the commission.

In framing interrogatories leading questions should not be put, and may be struck out at the trial if objected to by the opposite party: *Alcock v. Royal Ex. Ass. Co.*, 13 Q.B. 292; but not necessarily: *Small v. Nairn*, 13 Q.B. 840; *Lockwood v. Bew*, 10 P.R. 655.

Order for Commission.—The order will be made to suit the circumstances of each case: *Mills v. Wellbank*, 3 Scott, N.R. 177. The time and place and manner of examination should be fixed: *Greville v. Stultz*, 11 Q.B. 997; see also *Simms v. Henderson*, 11 Q.B. 1015; but see *Farrel v. Stephens*, 17 U.C.R. 250; but will be waived by the appearance of the opposite party to cross-examine: *Howkins v. Baldwin*, 16 Q.B. 375; *Darling v. Darling*, 9 P.R. 560.

A time is usually fixed in the order for return of commission, but it can be extended: *Clinton v. Peabody*, 7 M. & G. 399. The order usually contains a stay of proceedings, but only for limited time: *Forbes v. Wells*, 3 Dowl. 318. For form of order see Form 279.

Procedure.—If either party wants to use a document in the hands of the opposite party he must give notice to produce it: *Cunliffe v. Whitehead*, 3 Dowl. 634; and the examination should, if possible, be conducted upon the same rules as at *Nisi Prius*: *Id.*. A party cannot abandon an interrogatory in part: *Wheeler v. Atkins*, 5 Esp. 246. "Due notice" of the commission must be given (C.R. 504) otherwise depositions would not be received (2 Starkie's Evi. 264), as the opposite party has the right to cross-examine: *Id.*; *Attorney-General v. Davison*, McClell. & Y. 160.

The commission need not be indorsed with the style of cause nor need the evidence be annexed to it, and it should be so framed as to bind all parties to be examined, and particularly as to the mode of administering oaths to Jews or others: *Frank v. Carson*, 15 C.P. 135.

Under an order to take evidence on commission the evidence can only be taken on interrogatories unless otherwise ordered, and where, under such an order, the evidence was taken *via voce* it was suppressed: *Watts v. Anderson*, 5 Man. L.R. 291; *Mulligan v. White*, 5 Man. L.R. 40. But see C.R. 502, *infra* p. 264.

An *Ex parte* order can be obtained to open the commission before court. The practice is to open in presence of both parties: *Neale v. Withrow*, 4 U.C.L.J. 88.

An order for a commissioner to examine M. and other witnesses does not authorize him to examine M. only, without amendment: *Smith v. Babcock*, 9 P.R. 175; nor would it authorize the examination of the litigant party who obtained the commission: *Wright v. Shattuck*, 36 C.L.J. 143.

The evidence under a commission is receivable, notwithstanding the affidavit of examination is made by the commissioner, and returned under his hand, but not his seal: *Bench v. Odell*, 4 O.S. 8. The signature and seal of one purporting to be Chief Magistrate, to an affidavit of execution will be presumed genuine: *Doe Lamoine v. Raymond*, 5 O.S. 337. An affidavit that the examination of the witnesses was duly taken, not that the commission was duly taken in accordance with the literal wording of the statute, is sufficient, and need not be entitled in any cause: *McLeod v. Torrance*, 3 U.C.R. 146; *Doe Park v. Henderson*, 7 U.C.R. 182; see also *Passmore v. Harris*, 4 U.C.R. 344. The affidavit of due taking of commission need not be signed by the deponent: *Wilmot v. Wadsworth*, 10 U.C.R. 594. When commission will be ordered to be returned when defectively executed as supposed: see *Doe Hay v. Hunt*, 1 P.R. 44. If the affidavit substantially shows commission duly taken, it is sufficient: *Bunnel v. Whitlaw*, 14 U.C.R. 241. It is no objection that one of the witnesses affirmed: *Id.* It need not appear that the witness was examined where the mayor resides who takes the affidavit: *Stebbins v. Anderson*, 20 U.C.R. 239. The envelope containing commission must be under the hand and seal of commissioner, and there must be an affidavit of due taking, otherwise depositions cannot be read: *Reford v. McDonald*, 14 C.P. 150. The contraaction "Plff." and "Deft." in title of affidavit of execution is no objection: *Frank v. Carson*, 15 C.P. 135; nor if entitled in one court instead of another; *Comstock v. Burrows*, 13 U.C.R. 439. The affidavit must identify the depositions: *Milligan v. G. T. Railway Co.*, 16 C.P. 191.

If commission taken in Quebec, the affidavit can be taken before a Notary Public there: *Beard v. Steele*, 34 U.C.R. 43; R.S.O. c. 73, s. 37.

The Rules of the High Court apply to commissions under this Act: see section 145, and notes thereto.

Objections.—Evidence improperly taken may be rejected at the trial: *Lumley v. Gye*, 3 E. & B. 114. The reception of improper evidence should, however, be objected to on the examination, and if received, the objection should be noted in the notes of the witness's testimony. Advantage may then be taken of it, but not otherwise: *Robinson v. Davies*, 5 Q.B.D. 26; see *Watts v. Anderson*, 5 Man. R. 251. When the commission was not returned to the office mentioned in the order, it was held no objection to the evidence: *Stevenson v. Rae*, 5 C.P. 406. An opening in the envelope not large enough to let out any of the papers is no objection: *Frank v. Carson*, 15 C.P. 135. A person who acts under a commission, which contained specific directions as to the mode of return, cannot afterwards object that certain formalities prescribed by the statute, but not by the commission, have been omitted: *Frank v. Carson*, 15 C.P. 135; *Heyland v. Scott*, 19 C.P. 165. A commission produced at the trial in an envelope open at both ends, but otherwise unobjectionable was received: *Graham v. Stewart*, 15 C.P. 169. The affidavit of execution may speak of depositions or examinations as synonymous terms: *Muckle v. Ludlow*, 16 C.P. 420. The rigid provisions of the statute commented on: *Id.* Entitling defendant's name in the cause in the commission as "William" instead of "Samuel," held fatal, and the taking of evidence a void proceeding: *Graham v. Stewart*, 15 C.P. 169. Technical objections in Superior Courts held not

properly to be taken at the trial, but on application before it: *Lodge v. Thompson*, 26 U.C.R. 588. Objections to commission if not taken, are waived: *Farrel v. Stephens*, 17 U.C.R. 250; *Walton v. Apjohn*, 5 O.R. 65. Change of the day for the examination held no objection, in *Comstock v. Galbraith*, 21 U.C.R. 297; *Comstock v. Tyrrell*, 12 C.P. 173. A contraction in the name of a witness in the return of the commission is no objection: *Id.* Where the order was that the witnesses should "sign" the depositions, but the commission contained no such clause, it was held that the depositions were receivable: *Hodges v. Cobb*, L.R. 2 Q.B. 652. The oath of the commissioner may sometimes be dispensed with: *Roelen v. Melladew*, 10 C.B. 898. Although there are written interrogatories it is no objection that the commissioner put the questions *vice voce*: *Grill v. General Iron Screw Co.*, L.R. 1 C.P. 600; but if any interrogatory is not put, the evidence will be rejected: *Melville Mut. M. & F. Ins. Co. v. Driscoll*, 11 S.C.R. 183.

The fact that the depositions of a witness appeared to have been sworn to when signed, or immediately afterwards, and the objection was taken that he should have been sworn before the examination; it was held that if there was anything at variance with the instructions in this, it was an irregularity of which there should have been notice and which should have been moved against in Chambers: *Wurzburg v. Andrews*, 28 N.S.R. 387.

Objections to the evidence taken are not waived by cross-examining the witness after raising the objection, nor by omitting to object after the commission returned upon an application to send it back for a proper return, nor upon a further application to extend the time for the return. Waiver, as a general rule, is doing something after an irregularity committed, when the irregularity might have been corrected before such act was done. It might consist, too, of lying by and allowing the opposite party to take a fresh step in the case: *Watts v. Anderson*, 5 Man. L.R. 291.

Reviewing the Evidence on Appeal.—When witnesses have not been heard in the presence of the judge, but their depositions taken before a commissioner, a court of appeal may deal with the evidence more fully than if the trial judge had heard it, or there had been a finding of fact by a jury, and may reverse the finding of the trial court if such evidence warrants it: *Malzard v. Hart*, 27 S.C.R. 510; reversing 29 N.S.R. 340.

Costs.—When the evidence taken on commission was not used at the trial, owing to admissions by the plaintiff on his examination as a witness being substantially the same as the depositions taken on the commission, the costs of executing the commission were allowed, notwithstanding that such evidence was not used at the trial: *Rondat v. Monetary Times Printing Co.*, 18 P.R. 141.

Commissioners have a lien on commissions for their fees: *Peters v. Beers*, 14 Beav. 101; and a barrister has a lien for his fees on commission: *Smith v. Hallen*, 2 F. & F. 678. See section 147 and notes thereto.

When commission to take evidence of applicant, etc., may be granted.

142. No order shall be made for the issue of such commission for the taking of the evidence of the person applying therefor, or any person in his employment, unless in the opinion of the Judge a saving of expense will be caused thereby, or unless it is clearly made to appear that the person is aged, infirm, or unable from sickness to appear as a witness. R.S.O. 1887, c. 51, s. 136.

Saving Expense.—The law does not favor the taking of the evidence of the party applying for a commission or of any one in his employment, at least in Division Courts. But if the judge thinks a saving of expense would be effected by taking such evidence the commission may be allowed. If the person applying or some one in his employment be aged or infirm, or unable from sickness to appear the commission may also be ordered.

A party applying may, however, obtain an order for a commissioner to examine a co-plaintiff or a co-defendant: *Wilson v. McDonald*, 13 P.R. 6.

143. In case it is made to appear to the Judge that a material and necessary witness residing within the Province is sick, aged, or infirm, or that he is about to leave the Province, and that his attendance at Court as a witness cannot by reason thereof be procured, the Judge may make an order appointing a suitable person to take the evidence of the said person. A copy of the order, with two days' notice of the time, and place of the examination shall be served upon the opposite party, his solicitor or agent, who may appear, and cross-examine the witness. The evidence shall be taken on oath, and shall be reduced to writing, and signed by the witness, and shall be transmitted to the Clerk of the Court, and shall be by him kept on file, and may be used upon the trial, saving all just exceptions. The costs of the order shall be in the discretion of the Judge, and the reasonable charge of the examiner (to be fixed by the Judge) shall, in the first instance be paid by the party obtaining the order, as in the case of witness fees, and shall thereafter be paid as the Judge may order. R.S.O. 1887, c. 51, s. 137.

Examina-
tion of
witnesses
whose
attendance
at trial
cannot be
obtained.

Attendance at Court Cannot be Procured.—In order to found an application under this section the following circumstances must concur: (1) That the person proposed to be examined is a material and necessary witness residing within the province; (2) That such person is either (a) sick, (b) aged, (c) infirm, or (d) is about to leave the province; (3) That in consequence of the existence of one or more of these facts the attendance at court of such witness cannot be procured.

A material witness is one whose evidence is pertinent to the question to be tried and of importance to the person calling him.

A necessary witness is one whose evidence is so important that it would not be prudent or safe for a party to proceed to trial without it.

As a rule the application should not be granted until defendant has put in his defence: *Smith v. Greey*, 10 P.R. 531, and other cases cited in notes to section 141 p. 254.

The application should not as a rule be *ex parte*: *McKenna v. Everett*, 2 Beav. 188; *Anderson v. Anderson*, 1 Ch. Cham. R. 291; *Hope v. Hope*, 3 Beav. 317, 323; *Early v. McGill*, 1 Ch. Cham. R. 100, 257; *Bidder v. Bridges*, 26 Ch. D. 1; *Thomas v. Storey*, 11 P.R. 417.

But where the witness is dangerously ill or over seventy years of age, the High Court of Justice has generally granted the order *ex parte*: see *Bellamy v. Jones*, 8 Ves. 31; *McKenna v. Everitt*, 2 Beav. 188; *Oliver v. Dickey*, 2 Ch. Cham. R. 87; *Crippen v. Ogilvy*, 2 Ch. Cham. R. 304; *Bidder v. Bridges*, 26 Ch. D. 1, *per Selborne, L.C.*, at p. 9.

But the fact that the witness is about to leave the province, and there is danger that his evidence may be lost, unless promptly obtained, is no ground for granting the order *ex parte*: *Homes v. The C.P. Ry. Co.*, 8 C.L.T. 261; 5 Man. L.R. 346.

The evidence of the witness should not, however, be taken *ex parte*: *Warner v. Mosses*, 16 C.H.D. 100; and the examination of a witness conducted by one party without notice to his opponent is irregular and inadmissible as evidence: *Stephenson v. Dallas*, 13 P.R. 450. Where the proposed evidence would be inadmissible no purpose would be served in granting the order, and it would probably be refused: *Fisher v. Berrell*, 1 Dowl. N.S. 565; or would not support any issue to be tried: *Jones v. Tobin*, 4 Bing. N.C. 123; *Speeding v. Young*, 16 C.B.N.S. 824; *Galloway v. Keyworth*, 15 C.B. 228.

Where the court below had refused to admit the evidence of a particular witness, and the refusal was appealed from, the appellate court allowed the evidence of the witness, who was dangerously ill, to be taken *de bene esse* upon an undertaking as to costs: *Treasury Solicitor v. White*, 55 L.J.P. 79.

There is no provision made for the examination of parties to the action on their own motion but it is submitted that an order should be made in a proper case on motion by the party himself: see section 142; *Moffatt v. Prentice*, 9 C.L.J. 159; *Fisken v. Chamberlin*, 9 P.R. 283; *Fischer v. Hahn*, 13 C.B.N.S. 659; *Castelli v. Groom*, 18 Q.B. 490; and such examination might certainly be compelled by the opposite party or a co-defendant.

Where a motion is made by the party himself for his own examination, the court must be thoroughly satisfied of the *bona fides* of the application, and that it is not made for the purpose of avoiding cross-examination: *Berdan v. Greenwood*, 20 Ch. D. 764; *Langen v. Tate*, 24 Ch. D. 522; *Kidd v. Perry*, 14 P.R. 364; *Light v. Anticosti*, 58 L.T. 25; *Thomas v. Storey*, 11 P.R. 417.

The application should be made within a reasonable time after notice of defence: *Brydges v. Fisher*, 4 M. & Sc. 458, and other cases cited in notes to section 141, p. 254.

The names of the witnesses sought to be examined should be stated in the affidavit: *Gunther v. M'Tear*, 1 M. & W. 201; *Norton v. Lord Melbourne*, 3 Bing. N.C. 67, and cases cited in notes to section 141.

The order must state the names of the witnesses to be examined: *Warner v. Mosses*, 16 Ch. D. 103.

Sometimes it may be necessary to state upon what facts it is proposed to examine the witness: see *Barry v. Barclay*, 15 C.B.N.S. 849; see notes to section 141.

In an action under Lord Campbell's Act, an order was made for the examination before trial, on behalf of the plaintiff, of the only witness to the accident which occasioned the death of deceased. It was provided that the examination should not be used at the trial, unless the plaintiff was unable to procure the attendance of the witness: *Elliott v. The C.P. Ry. Co.*, 12 P.R. 593.

No provision is made as to the evidence by which the application is to be supported. An affidavit by a person having knowledge of the facts would be sufficient. If a solicitor were employed, he or his managing clerk would ordinarily be able to make the necessary affidavit: *McHardy v. Hitchcock*, 17 L.J. Ch. 256; *Elmsley v. Cosgrave*, 6 P.R. 164; *Lloyd v. Henderson*, 6 P.R. 254; *Baker v. Jackson*, 10 P.R. 624.

Where an application was made on the ground that the parties concerned all lived abroad, and that the surviving witness to be examined was greatly afflicted with gravel, the order was made, although the

affidavit only stated the witness was upwards of 60 years old: *Fitzhugh v. Lee*, *Ambl.* 65.

The Court of Chancery always allows the examination *de bene esse* of a witness about to go abroad: *Bown v. Child*, 3 *Sim.* 457; *McIntosh v. The G.W. Ry. Co.*, 1 *Hare.* 328; *McKenna v. Everitt*, 2 *Beav.* 188; *Grove v. Young*, 3 *Detl.* & *S.* 397; see also *Warner v. Mosses*, 16 *Ch. D.* 100.

But if it is in the power of the party applying to detain the witnesses till they have been examined in the ordinary course, the order will not be made: *East India Co. v. Naish*, *Bunb.* 320.

It is doubtful whether the fact that a witness is in a state of pregnancy, or about to be delivered of a child, is a cause for granting the order: see *R. v. Wellings*, 3 *Q.B.D.* 426. At all events, in applications founded on pregnancy of the witness, an affidavit of a competent person should be produced showing that the delivery would probably happen about the time fixed for the trial, or so near as to render the attendance of the witness perilous: *Abraham v. Newton*, 8 *Bing.* 274; see also *R. v. Inhabitants of Huddersville*, 7 *E. & B.* 794.

An order may be granted where a witness is so unwell that there is no probability of his being able to attend the trial: *Pond v. Dimes*, 3 *M. & Sc.* 161; *Bellamy v. Jones*, 8 *Ves.* 31; *Jephson v. Greenaway*, 2 *Fowl. Ex. Pr.* 102.

The affidavit of a medical man should generally be produced in such cases: *Davis v. Lowndes*, 7 *Dowl.* 101; *Duke of Beaufort v. Crawshay*, *L.R.* 1 *C.P.* 699; or else his certificate or opinion should be verified by affidavit; but the affidavit of the solicitor of his information and belief, with grounds thereof, was held sufficient: *Baker v. Jackson*, 10 *P.R.* 624.

It is not necessary, generally, for the defendant to swear to merits when the application is made on his part, nor that it is not made for the purposes of delay: *Baddeley v. Gilmour*, 1 *M. & W.* 55.

Disobedience to the order could be punished by attachment: see section 73; *Martin v. Bannister*, 4 *Q.B.D.* 491; *Richards v. Cullerne*, 7 *Q.B.D.* 623.

There is no provision for the production of books, papers and documents on such examination.

The examiner has no discretion as to the materiality of the questions put, unless upon matters which would clearly and palpably not be evidence: *Surr v. Walmsley*, *L.R.* 2 *Eq.* 439; but he should note any question objected to: *Richardson v. Davies*, 5 *Q.B.D.* 16.

In *Wright v. Wilkin*, 4 *Jur. N.S.* 804, it was said that the court would not delegate to the examiner the power of treating a witness as hostile so as to authorize the examination to be conducted in the nature of a cross-examination by the party calling him, but Lord Cairns, *L.C.*, in *Ohlsen v. Terrero*, *L.R.* 10 *Ch.* 129, strongly disapproved of this ruling and pointed out that if a witness or his counsel thought that he was being unfairly dealt with he might refuse to answer a particular question, and upon that refusal the matter might be brought before the court, who would decide whether the examiner was pursuing a proper course or not in allowing a witness to be treated as hostile: as to hostile witnesses, see *Rice v. Howard*, 16 *Q.B.D.* 681; *Buckley v. Cooke*, 1 *K. & J.* 29; notes to section 137, *ante* p. 247.

The depositions must be signed by the witness or they will not be received in evidence except by consent.

The examiner's room is not a public court and he must exclude other persons than those entitled to be there if requested by either party: *Re Western of Canada Oil Lands, etc., Co.*, 6 *Ch. D.* 109; see *Rich v. Stark*, 8 *C.L.T.* 191; *Hands v. Upper Canada Furniture Co.*, 12 *P.R.* 292.

The statute requires two days' notice of the time and place of examination to be served upon the opposite party. If the notice were not given and the opposite party did not attend on the examination the evidence would be rejected: *Steinkeller v. Newton*, 9 C. & P. 313. But it is not necessary that he should exercise the power of cross-examining the witness; all that is required is that he shall have the opportunity of doing so: *Cazenove v. Vaughan*, 1 M. & S. 4; and his right to take part in the examination might possibly be waived by giving notice that he would not do so: *McCombie v. Anton*, 6 M. & G. 27.

The depositions could not be received as evidence in a suit between other parties: *Doe v. Derby*, 1 A. & E. 783, 786.

All just exceptions to the admission of the depositions are reserved to the opposite party. On this point, and on the subject of examinations generally, see notes to section 141. The depositions may be used at the trial.

The fact that the judge has made the order directing the evidence to be taken by an examiner is sufficient to enable the party obtaining the order to put the depositions in evidence, saving all just exceptions: *Ryan v. Devereux*, 26 U.C.R. 100.

If the examination is not used no costs of it should be allowed: *McMillan v. McMillan*, 8 C.L.J. 285; *Curling v. Robertson*, 7 M. & G. 525; *Ridley v. Sutton*, 1 H. & C. 741; *Dominion, Etc., Co. v. Stinson*, 9 P.R. 177. But where a witness was so old and infirm that it was prudent to take his examination, but he was afterwards able to attend the trial, the plaintiff was allowed both the costs of the examination and of his attendance at the trial, and the expenses of the journey of the son of the witness and his attendance upon him in giving evidence, in consequence of the age and infirmity of the witness, were also allowed: *Duke of Beaufort v. Earl of Ashburnham*, 13 C.B.N.S. 598.

Unless some special ground appears for ordering otherwise, the costs of the examination will usually be made costs in the cause: *Princee v. Samo*, 4 Dowl. 5; *McMillan v. McMillan*, 8 C.L.J. 285.

The evidence is to be taken under oath. Power is given by section 144, sub-section 2, to administer the oath. This includes affirmations and declarations; see R.S.O. c. 73, sections 12, 15, notes to sections 116, sub-section 3, and to section 141. If no objection is made before the examiner it might have the effect of waiving the right afterwards to object to the admissibility of the objectionable part at the trial: *Robinson v. Davies*, 5 Q.B.D. 26; see also *Cutler v. Wright*, W.N., (1890) 28; A mere irregularity in taking the deposition would be the subject of special application to the Judge to have it suppressed, but it would not be an objection to its admissibility at the trial: *Grill v. Iron Screw Collier Co.*, L.R. 1 C.P. 600.

The evidence must be taken on oath, reduced to writing, signed by the witness, transmitted to the clerk of the court, and by him kept on file ready to be produced when required. To render it evidence it should be produced from the proper custody and purport to be duly taken: *Reford v. McDorald*, 14 C.P. 150. The production by the clerk would not, however, be necessary to its reception; if otherwise correct the evidence would, it is submitted, be receivable.

It would seem that the evidence could be taken if material, whether there were other witnesses to testify to the same fact or not. It is submitted that the rule laid down in that respect in *Jameson v. Jones*, 3 Ch. Cham. 98, does not apply to this section.

A special examiner or officer of court taking an examination in a cause or proceeding pending in court has no power to authorize any other person to take down the depositions in shorthand; and a person cannot

be compelled, in the face of his objection, to submit himself for examination when the examiner proposes to have the depositions so taken: *Bradt v. Bradt*, 9 C.L.T. 472.

Where the interests of a witness might be affected by the examination, it was held that he was entitled to have counsel present, upon the examination to protect his interests: *Dominion Bank v. Bell*, 13 P.R. 471.

144.—(1) An order may also be obtained for the examination of a witness who resides in a remote part of the Province, and at a great distance from the place of trial, if it be clearly made to appear that his attendance cannot be procured, or that the expense of his attendance would be out of proportion to the amount involved in the action, or would be so great that the party desiring his attendance should not, under the circumstances, be required to incur the same; and the proceedings thereon, and the order as to costs, shall be the same as in the case of an order in the next preceding section mentioned.

Examination of witness residing at a distance from place of trial.

(2) Any person appointed to take an examination under this or the next preceding section shall have authority to administer an oath to the person to be examined. R.S.O. 1887, c. 51, s. 138.

Remote Part of the Province.—These words are of relative import. No definite meaning can be given to them. They must be construed in relation to the circumstances of the case. Mere distance alone would not govern. Worcester defines "remote" as "distant in place, time or connection; far; far off; not near; not nigh." The residence of a witness may be considered as "remote" from the place of trial although the actual distance may not be great. The season of the year at which the court is to be held, the accessibility to the place of trial, the facilities of travel by rail or steamboat, the expense which the witness would be put to, the time of his absence from home, the convenience of travel to and from the place of trial, should all be considered in defining the word "remote" as distant in time, place or connection." The same may be said of the expression "great distance from the place of trial." It is an expression which must be construed *relatively*. Like "gross" negligence, it is simply remoteness after all: see *Wilson v. Brett*, 11 M. & W. 113; *Beal v. South Devon Ry. Co.*, 3 H. & C. 337; *Grill v. General Iron Screw Co.*, L.R. 1 C.P. p. 612.

The affidavit must show "clearly" why the witness cannot be procured or what the expense of his attendance would be, so that the judge may infer that it would be out of proportion to the amount involved in the action, or so great as to be practically prohibitive.

The evidence must be taken and returned and may be used in the same manner as under section 143.

145. The provisions of the rules of the Supreme Court of Judicature, so far as the same are applicable, shall apply to every commission issued under the authority of this Act. R.S.O. 1887, c. 51, s. 139.

Rules made applicable to commissions.

RULES OF THE SUPREME COURT OF JUDICATURE.

499.—(1) Where the testimony of a person who is residing without the limits of Ontario is required, the court or a judge may order the issue of a commission for the examination of such person. Con. Rules 586, 588.

(2) Where the commission appears to be necessary in proceedings before a Master, or Referee, it may be issued on the order of the Master or Referee. Con. Rule 590.

500. If a party for whose examination a commission has so issued under Rule 499, refuses to attend before the Commissioner, a verdict or judgment may pass against him or he may be nonsuited. Con. Rule 587.

501. The notice of motion for a commission to take evidence shall state the name and address of the commissioner proposed by the applicant; and if the opposite party desires to name a commissioner, he shall, on the return of the motion, give notice to the applicant of the name and address of such commissioner; and the order may direct the issue of the commission directed to the persons so named, or to such person as may seem proper. Con. Rules 591, 592.

502. Unless otherwise directed by the order, the examination of witnesses shall be upon oral questions, and notice of the execution of the commission shall be given to the opposite party, if, before the expiry of the time limited for mailing the commission or within such time as may be provided by the order, he gives the name and address of a person resident within two miles of the place where the commission is to be executed, on whom such notice may be served. Con. Rules 593, 596.

503. Where the examination is to take place upon written interrogatories, the interrogatories in chief shall be delivered to the opposite party (unless otherwise ordered) at least 8 days before the issue of the commission; and the cross-interrogatories shall be delivered to the opposite party (unless otherwise ordered) within 4 days after the receipt of the interrogatories in chief; and in default of cross-interrogatories being so delivered, the opposite party may send the commission without cross-interrogatories. Con. Rule 595.

504. Where notice of the execution of the commission is required to be served, 48 hours' notice shall be sufficient; such notice shall be in writing, stating the time and place of the intended examination, and shall be addressed to the person named for that purpose before the expiry of the time limited for mailing the commission or as provided in the order; and service upon him, or upon a grown up person, at the address given shall be sufficient. If the name or address given proves to be illusory or fictitious, or if the party so notified fails to attend, pursuant to the notice, the commission may be executed *ex parte*. Con. Rules 589, 596, 597. Rules 29 Dec. 1894, 1388.

505. The witnesses shall be examined on oath, affirmation, or otherwise in accordance with their religion, by or before the commissioner. Con. Rule 599.

506. The oral questions and answers shall be reduced into writing and returned with the commission. Con. Rule 594.

507. Where a witness does not understand the English language the commission shall be executed with the aid of an interpreter nominated by the commissioner, and sworn by or before him to interpret truly the questions to be put to the witness, and his answers thereto, and the examination shall be taken in English. See Con. Rule 600.

508. If a witness produces a book, document, letter, paper or writing, and refuses for good cause, to be stated in his deposition, to part with

the original, then a copy or extract, certified by the commissioner to be a true and correct copy or extract, shall be annexed to the deposition of the witness. Con. Rule 598.

509. The depositions may be taken in shorthand if so provided by the order or the parties so agree. (New.)

510. If the examination is to be taken in shorthand, the commissioner may take the same in shorthand or employ a shorthand writer, to be duly sworn. Rules 23 June, 1894, 1346, *part*.

511.—(1) Unless the examination is taken in shorthand the depositions shall be subscribed by the witness and by the commissioner.

(2) Where taken in shorthand it shall not be necessary that the depositions be read over or signed by the person examined unless any of the parties so desire.

(3) A copy of the depositions if taken in shorthand by the commissioner and certified by him, or, if taken in shorthand by a shorthand writer employed for the purpose as aforesaid, certified by him and signed by the commissioner, shall for all purposes have the same effect as original depositions. Con. Rule 601. Rules 23 June, 1894, 1346.

512. The interrogatories, cross-interrogatories, and depositions and any documents or certified copies thereof or extracts therefrom, referred to therein, shall be sent to the proper officer, on or before such day as may be ordered in that behalf, enclosed in a cover under the seal of the commissioner; and the same or office copies thereof may be given in evidence by and on behalf of the parties respectively, saving all just exceptions, without any other proof of the absence from Ontario of the witness therein named than an affidavit of the solicitor or agent of the party as to his belief of such absence. Con. Rule 602.

513.—(1) Where, upon the application for a commission to take evidence, the opposite party desires to join in the commission and examine witnesses on his own behalf thereunder, or names a commissioner, each party shall pay the costs of the commission consequent upon the examination of his witnesses and the appointment of his commissioner, without prejudice to the question by whom such costs are ultimately to be borne. Con. Rule 603, *part*.

(2) If for any reason the commissioner named by either party refuses to act upon receiving 48 hours' notice in writing from the other commissioner so to do, the commission may be executed by the commissioner giving such notice. Con. Rule 603, *part*.

514. Every order for a commission shall be read as if it contained the above particulars, and shall not set forth the same, but may contain any variations therefrom, and any other directions, which the court or judge sees fit to make. Con. Rule 604.

515. A commission when returned shall be opened at the trial or before trial at the instance of any party (without order) by the officer to whom it is returned on two clear days' notice to the parties interested. (New.)

146. The commission with the evidence taken thereunder and the papers therewith, shall forthwith be returned to the Clerk of the Division Court in which the action to which the same relates is pending. 52 V. c. 12, s. 14.

Return of
commission
to take
evidence.

Formerly the commission was returned to the clerk of the County Court and transmitted by him to the clerk of the Division Court.

Costs of
commis-
sion.

147. The costs of the issue, transmission, execution and return of any such commission shall be in the discretion of the Judge of the Court in which the action is pending, who may allow a sum in gross therefor; and the costs may be added to any other costs to be paid to the party entitled thereto, and may be recovered by the party entitled thereto in like manner as the ordinary costs of the action are recoverable by the practice of the Division Courts. R.S.O. 1887, c. 51, s. 141; 52 V. c. 12, s. 15.

Costs.—Formerly costs were taxed on the County Court scale, but now the amounts and the method of arriving at them is in the discretion of the judge. Such discretion must be exercised judicially: see notes to section 8; Stroud, 216.

Books of Account, Affidavits, etc., as Evidence.

Judge may
receive in
evidence
plaintiff's
or defend-
ant's books
of account.

148. In an action for a debt or demand, not being for tort, and being under \$25, the Judge on being satisfied of their general correctness, may receive the plaintiff's books as evidence, or in case of a defence of set-off or of payment, so far as the same extends to \$25, may receive the defendant's books as evidence, and the Judge may also receive as evidence the affidavit or affirmation of any party or witness in the action resident without the limits of the county, but, before pronouncing judgment, the Judge may require such witness or any party in a cause to answer upon oath or affirmation any interrogatories that may be filed in the action. R.S.O. 1887, c. 51, s. 142; 60 V. c. 3, s. 3.

Debt or Demand.—See notes to section 113.

Books of Account as Evidence.—The judge must first be satisfied of the "general correctness" of the books, and if he is it is then permissible to receive them. The defendant's books are only receivable in evidence upon the defences of set-off or payment. The experience of most judges is that the evidence of well kept books, in which the original entries are made in regular order, is of the most reliable and satisfactory character. Books of account may also be used to refresh the memory in other cases than those provided for in the section: Taylor on Evi. 1198-1206; or as entries made by a deceased person against his pecuniary or proprietary interest: Higham v. Ridgway, 3 Sm. L.C. Edson ed. 1607; Taylor on Evi. 558; or in the usual course of business and made contemporaneously with the acts to which they relate: Price v. Torrington, 1 Sm. L.C. Edson ed. 566; Taylor on Evi. 612-624; or in actions between master and servant, tradesman and shopman, banker and customer, or co-partners, when the opposite party has had ample opportunities from time to time for testing the accuracy of the entries: Taylor on Evi. 704.

But a witness will not be allowed to look at a copy of a memorandum which he made six months after the original entry in order to refresh his memory: Jones v. Stroud, 2 C. & P. 196. When counsel puts a paper into a witness's hands for the purpose of refreshing his memory the

opposite counsel has a right to see it and cross-examine or re-examine upon it without being bound to read it in evidence: *R. v. Ramsden*, 2 C. & P. 603.

Affidavit or Affirmation.—To save expense this provision has been introduced. The witness must be "*resident*" without the county. As to what constitutes "*residence*," see notes to section 84.

Any Interrogatories, Etc.—The right of cross-examination is here recognized: *Attorney-General v. Davison*, McClel. & Y. 160. It is submitted that the affidavit of a person resident out of the province could be received.

INSPECTION, PRESERVATION, AND DETENTION OF PROPERTY.

It shall be lawful for the judge, upon the application of any party to an action or matter, and upon such terms as may be just, to make any order for the detention, preservation, inspection, surveying, or measuring of any property or thing being the subject of such action or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid, to authorize any person to enter upon or into any land or building in the possession of any party to such action or matter, and for all or any of the purposes aforesaid to authorize any samples to be taken, or any observation, plan, or model to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence: Rule 257.

Any Party to an Action.—Inspection cannot be obtained under this rule by defendant against another when no right is in question between them in the action. The application need not, however, in all cases be by plaintiffs against defendants, or *vice versa*, but it must be by and against parties between whom there is some right to be adjusted in the action: *Shaw v. Smith*, 18 Q.B.D. 193; see also *Brown v. Watkins*, 16 Q.B.D. 125.

Detention and Preservation of Property.—Where a defendant alleged that jewellery, the subject of the action, belonged to a third party, and had been deposited with him as security for a debt, it was ordered to be deposited in court: *Velati v. Braham*, 46 L.J.C.P. 415. Where, in an action for the return of diamonds deposited with the defendant, the latter refused the option of bringing the value of them into court, an order was made for their delivery to the court within forty-eight hours: *Ridpath v. Zachaer*, 9 T.L.R. 538. Where the property, which is the subject matter of the action, is being damaged, the plaintiff may be appointed receiver and manager: *Hyde v. Warden*, 1 Ex.D. 309. Where there is immediate danger of the chattels in question in the action being disposed of, an order may be made appointing a receiver: *Taylor v. Eckersley*, 2 Ch.D. 302. An order might also be made commanding a defendant to do an act necessary for the preservation of the property in question: *Strelley v. Pearson*, 15 Ch.D. 113; and where in the event of an appeal by an appellant being successful, success would be useless, the fund was protected; in the meantime an order was made containing an injunction pending the appeal: *Polini v. Gray*, 12 Ch.D. 438. But this could not now be done in Division Courts, the right to grant injunctions in such courts being expressly prohibited: section 75 (2).

Inspection of Property.—Liberty may be given to the plaintiff to enter on the defendant's land and dig up soil for the purpose of discovering the course of a drain, the subject of the action: *Lumb v. Beaumont*, 27 Ch.D. 356. Where a defendant refused to accept a shipment of butter, and claimed to hold sample tubs as a separate purchase and refused to give them up, an order was made authorizing the plaintiff and his witnesses to enter upon the defendant's lands and buildings to make observation of them: *Munn v. McConnell*, 7 C.L.T. 169.

Where, however, in an action complaining of a nuisance, proof of the nuisance could be obtained from external sources, an application to inspect the defendant's works to ascertain how the nuisance was occasioned, was refused: *Barlow v. Bailey*, 18 W.R. 783. In *Lewis v. Earl of Lonsborough*, (1893) 2 Q.B. 191, documents in the possession of the opposite party were ordered to be placed in the custody of an officer of the court, and the applicant was given leave to take photographs of them, the photographing to be done in the presence of the opposite party. In an action for overdue instalments of subsistence, money payable by a syndicate formed for working an invention of the plaintiff, inspection of the article invented in course of construction was refused: *Burton v. War Ordinance Syndicate*, 8 T.L.R. 246.

An order for inspection of the subject matter of an action will not be made if the defendant has neither possession nor property in the same, and the person having such possession or property is not before the court: *Reid v. Powers*, 28 Sol. Jour. 653; *Garrard v. Edge*, 37 W.R. 501.

Experiments.—Applications authorizing experiments to be tried have been made chiefly in patent cases which are generally beyond the jurisdiction of Division Courts: *R. v. Halifax C.C. Judge*, (1891) 2 Q.B. 263; see notes to section 71, *ante* p. 79. The court may, under the rule, employ independent expert evidence to give advice upon which the court may form its judgment: *Badische v. Anilin und Soda Fabrik v. Levinstein*, 24 Ch. D. 156.

Costs.—The plaintiff may be ordered to pay the costs of the inspection of defendant's property in any event: *Mitchell v. Darley Main Colliery Co.*, 10 Q.B.D. 457.

Terms.—The party who obtains the possession of any property under an order made pursuant to this rule may be required to enter into an undertaking not to deal with it except under the direction of the court, and to abide by any order which the court may think fit to make as to damages or otherwise: *Taylor v. Eckersley*, 2 Ch. D. 302. The order may also include the taking of depositions as provided by Rule 258.

Report on Such Inspection.—The order under the foregoing rule (257) may include an order for the clerk or some other person named therein to examine upon oath and take the depositions of the expert employed by the court as to such measure, weight inspection, or the correctness of such survey, or the result of such experiment, or the fairness of such samples, or the accuracy of such plans or model, and such order may also empower any or either party to give the depositions so taken in evidence upon any trial or proceeding: Rule 258. The depositions under this rule should be taken only after notice to both parties, and should be signed by the party making it, and filed with the clerk and kept with the papers.

Where Defendant Seeks to be Relieved of Liability.—Where by any contract a *prima facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the judge may make an order for the preservation or interim custody of the subject matter of the litigation, or may order that the amount in dispute be brought into court or otherwise secured: Rule 259.

Enforcement of the Order.—An order under this rule for the payment of money as between debtor and creditor could not be enforced by attachment: *Phosphate Sewage Co. v. Hartmont*, 25 W.R. 743; *Ex parte Hooson*, L.R. 8 Ch. 231; *Roberts v. Donovan*, 21 O.R. 535; *Berry v. Donovan*, 21 A.R. 14.

Other orders under this rule should be enforced by attachment: *Hutchinson v. Hartmont*, W.N. (1877) 29; *Richards v. Cullerne*, 7 Q.B.D. 623.

STAYING PROCEEDINGS.

The judge may stay proceedings in a Division Court in any case in which, if the action were in the High Court, an order to stay might be made: Rule 293.

In the High Court.—By the Judicature Act, R.S.O. c. 51, s. 57, s-s. 9, it is enacted :

"9. No cause or proceeding at any time pending in the High Court of Justice, or before the Court of Appeal, shall be restrained by prohibition or injunction; but every matter of equity upon which an injunction against the prosecution of any such cause or proceeding might have been obtained, prior to The Ontario Judicature Act, 1881, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto:

"Provided always, that nothing in this Act contained shall disable either of the said courts from directing a stay of proceedings in any cause or matter pending before it, if it shall think fit; and any person, whether a party or not to any such cause or matter, who would have been entitled, prior to The Ontario Judicature Act, 1881, to apply to any court to restrain the prosecution thereof, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in such cause or matter may have been taken, shall be at liberty to apply to the said courts respectively, by motion in a summary way, for a stay of proceedings in such cause or matter, either generally, or so far as may be necessary for the purposes of justice; and the court shall thereupon make such order as shall be just."

A Stay of Proceedings May be Granted:

(1) Where an action or proceeding is frivolous or vexatious: see *Ross v. Edwards*, 15 P.R. 150; *Metropolitan Bank v. Pooley*, 10 App. Cas. 210; *Lawrance v. Lord Norreys*, 15 App. Cas. 210. *Re Chaffers*, 76 L.T. 351; *Blair v. Cordner*, 36 W.R. 64; *Chatterton v. Secretary of State*, (1895) 2 Q.B. 189; *Kellaway v. Bury*, 66 L.T. 599, where the principles are discussed and explained. As where a second action is brought for the same cause of action as a former action which was dismissed so that a plea of *res judicata* must succeed: *Macdougall v. Knight*, 25 Q.B.D. 1; or where relief can be obtained in the pending action: *Poulett v. Hill*, (1893) 1 Ch. 277.

(2) Where an action is brought against a judge for any act done in that capacity: *Cobbett v. Field*, W.N. (1877) 8; *Hind v. Brett*, W.N. (1883) 37.

(3) Where an action is brought against a witness for defamatory statements made by him when giving evidence before a court of justice: *Dawkins v. Lord Rokeby*, L.R. 7 H.L. 744.

(4) Where the plaintiff admits the claim to be without foundation: *Jamieson v. Laing*, 7 P.R. 404.

(5) Where a suit has been compromised: *Rees v. Carruthers*, 17 P.R. 51; *Eden v. Nash*, 7 Ch. D. 781; *Re Gaudet*, 12 Ch. D. 882; *Kelly v. Falls*, 16 W.R. 136; see *Johnston v. The G.T. Ry. Co.*, 25 O.R. 64: but a compromise entered into by a solicitor contrary to instructions may be set aside on payment of costs: *Watt v. Clark*, 12 P.R. 359: or where the defendant has conceded the relief asked: *North v. Great Northern Ry.*

Co., 2 Giff. 64; or where the proceedings are contrary to good faith: *Mosenti v. Lawson*, 4 A. & E. 331; *Cocker v. Tempest*, 7 M. & W. 502; *Henderson v. Underwriting Assn.*, 65 L.T. 732.

(6) For non-payment of costs: *Stewart v. Sullivan*, 11 P.R. 529; *Wright v. Wright*, 12 P.R. 42; *McCabe v. Bank of Ireland*, 14 App. Cas. 413; but see *Campbell v. Elgie*, 16 P.R. 440, and note *infra* as to security for costs.

(7) One of two cross-actions between the same parties may be stayed: *Thompson v. The G.W. Ry. Co.*, 9 Q.B.D. 320; *Taylor v. Bradford*, 9 P.R. 350; *Connie v. The C.P. Ry. Co.*, (No. 2) 11 P.R. 222; see *Adamson v. Tuff*, 44 L.T. 420.

(8) Where there is another action pending in another court for the same cause: Rule 278: R.S.O. c. 51 s. 57 (10).

(9) Where there are several actions in which the questions in dispute are substantially the same, and the evidence in each would be substantially the same if they were all tried: *Niagara Grape Co. v. Nellis*, 13 P.R. 179; *Vaughan Road Co. v. Fisher*, 14 P.R. 340; see *Williams v. Township of Raleigh*, 14 P.R. 50.

(10) Where the action is brought without plaintiff's authority: *Barrie v. Weaymouth*, 15 P.R. 95; *Taylor v. Wood*, 14 P.R. 449; *Newbigging-on-the-Sea v. Armstrong*, 13 Ch. D. 310; *Frieker v. Van Grutten*, (1896) 2 Ch. 649; *Barrie v. Barrie*, 19 P.R. 33; see *Scribner v. Parcels*, 20 O.R. 554; *Lea v. Lang*, 17 P.R. 203.

(11) A stay may also be granted until security for costs is given: Rule 294.

(12) Where several actions are brought against sureties, and a separate action is brought against the principal debtor, and is pending, the actions against the sureties may be stayed pending the determination of the action against the principal: *County of Essex v. Wright*, 13 P.R. 474.

Practice.—All applications to set aside or stay any order, judgment, process or proceeding and all other applications except in matters which may be disposed of upon an *ex parte* application to the judge and applications otherwise specially provided by the rules may be made *viva voce* at any sitting of the court, if both parties be present, or upon affidavit, the opposite party having notice of such application and of the grounds thereof, and the order or decision of the judge upon such application, if made at a sitting of the court shall be entered by the clerk as in other cases of order made; if made upon affidavit elsewhere it shall be mailed to the clerk or delivered at his office: Rule 251.

No formal order need be drawn up, if made at a sitting of the court.

Form of order see Form 295.

SECURITY FOR COSTS.

Proceedings may be stayed by order of the judge in an action until security shall be given to the defendant for the costs of and incidental to his defence, in a case and under circumstances which would justify an order being made in the High Court: Rule 294.

This rule adopts as law the decision in *Fletcher v. Noble*, 9 P.R. 257.

Security for costs may be ordered in the High Court:—

(1) Where the plaintiff ordinarily resides out of Ontario: C.R. 1198 (a) (b); *Allcroft v. Morrison*, 19 P.R. 59.

(2) Where a plaintiff has brought a former action or proceeding for the same cause, which is pending either in Ontario or in any other country, or in which judgment or order has passed against him in such action for costs, and such costs have not been paid: *C.R. 1198 (c)*; *Campbell v. Elgie*, 16 P.R. 440.

(3) When the plaintiff sues as an informer or seeks to recover any penalty given to any informer or person who sues for the same under any statute or law in which any penalty is given to any person who sues for the same, either for his sole benefit, or for the benefit of the Crown, or partly for his benefit and partly for the benefit of the Crown, and an affidavit is made by the defendant showing that the action is brought to recover a penalty, and that, in the belief of the deponent, the plaintiff or informer is not possessed of property sufficient to answer the costs of the action in case a verdict is given or judgment rendered in favor of the defendant, and that he, the defendant, has a good defence to the action upon the merits as he is advised and believes: *C.R. 1200*.

(4) Where an action is brought in the name of an insolvent person for the benefit of some other person: *Boice v. O'Loane*, 7 P.R. 359; *Re Rainy Lake Lumber Co.*, 11 P.R. 314; *Clark v. St. Catharines*, 10 P.R. 265; *Delaney v. McLellan*, 13 P.R. 63; *Cowell v. Taylor*, 31 Ch. D. 34.

(5) In actions against justices of the peace or other officer or person fulfilling any public duty where plaintiff is not possessed of such property as would be forthcoming and available in execution, should the defendant succeed: *R.S.O. c. 89*; *Bready v. Robertson*, 14 P.R. 7. The affidavit must show a good defence upon the merits, or that the grounds of the action are trivial or frivolous; but affidavits controverting the defence will not be received, nor will any nice questions of law, or any reasonable question of fact be dealt with on the application: *Southwick v. Hare*, 15 P.R. 222; *Lancaster v. Ryckman*, 15 P.R. 199; *Bartram v. London Free Press*, 18 P.R. 11; *Paladino v. Gustin*, 17 P.R. 553; *Macdonald v. World*, 16 P.R. 324. If the pleadings are of such a character that the case cannot go on them to the jury against the defendant as a public officer he cannot claim the protection of the statute although he shows by affidavits that his sole connection with the matter complained of was in his public capacity: *Parkes v. Baker*, 17 P.R. 345.

(6) Where a false address is given by plaintiff: *Re Sturgis*, 34 W.R. 163; *Fournier v. Hogarth*, 15 P.R. 72; see *Pittsburg Crushed Steel Co. v. Jacob Marx & Co.*, W.N. (1897) 36.

(7) Where there are several plaintiffs not having joint interests, and some of them are resident out of the jurisdiction, the latter will be required to give security for costs: *Irving v. Clark*, 12 P.R. 29; *Smith v. Silverthorn*, 15 P.R. 197.

(8) Where a married woman, though unnecessarily, sues by an insolvent next friend: *Re Thompson*, 38 Ch. D. 317.

(9) A defendant resident out of the jurisdiction, who admits the plaintiff's claim and sets up a counterclaim founded upon a separate transaction, may be ordered to give security for costs: *Sykes v. Sacerdote*, 15 Q.B.D. 423.

(10) Claimants in garnishee and interpleader proceedings, resident out of the jurisdiction, may, in the High Court, be ordered to give security for costs: *Canadian Bank of Commerce v. Middleton*, 12 P.R. 121; *Tomlinson v. Land and Finance Corporation*, 14 Q.B.D. 539.

(11) Where both parties were resident out of the jurisdiction security was ordered to be given by both: *Re La Compagnie Général*, (1891) 3 Ch. 451, at p. 458.

It will be noticed that the rule (294) only applies to security for costs to be given to a defendant, and instances (9) and (10) do not apply.

Proceedings May be Stayed.—The rule does not give power to limit the time within which security for costs may be given, nor any power to dismiss the action for failure to give security. No provision is made for the revival of the action if the court day has passed before the security is given. The defendant is summoned only for a certain day, and, in the absence of an adjournment on that day (or failure to hold court: Rule 253), the action is at an end: *Forbes v. Michigan Cent. Ry. Co.*, 20 A.R. 584, 589; see Rule 161. If the proceedings are wholly stayed, and the day for which the defendant had been summoned passes without the adjournment, the stay may thus operate as a dismissal. It may be necessary to provide in every order, for this emergency, by reserving leave to the defendant to move for an adjournment at any sitting of the court when the action shall come on for trial.

Form of Security.—In making the order for security the judge may adopt the practice of the High Court: Section 312. The order should prescribe the kind of security to be given. It is suggested that it should provide that, if given by bond, it should be made in favor of the defendant, and filed with the clerk after being approved by the judge, or by the defendant's solicitor, and, if by deposit of a sum of money, it should be paid into court. It should also provide that the bond or the money should be subject to the further order of the judge.

For forms of order and bond see Forms 189 and 297.

Affidavits
may be
sworn
before a
Judge,
Clerk, etc.

149. All affidavits to be used in Division Courts or before any of the Judges thereof, may be sworn before a County Judge or before the Clerk or Deputy Clerk of a Division Court, or before a Judge, Notary Public or Commissioner for taking affidavits in the High Court. R.S.O. 1887, c. 51. s. 143.

All Affidavits.—As to affidavits generally see Rules 262 to 269, and notes to sections 103 and 115.

The heading of an affidavit is merely descriptive and not an allegation of fact: *Hood v. Cronkite*, 4 P.R. 279; *Re Green*, 15 C.L.J. 35.

The name of the court and style of cause should appear in affidavit. Rule 263: *Allman v. Kensel*, 3 P.R. 110; *Swift v. Jones*, 6 U.C.L.J. 63; *Hart v. Ruttan*, 23 C.P. 613; *Re Sharpe*, 2 Ch. Cham. 67; *McDonald v. Cleland*, 6 P.R. 289; *Scott v. Mitchell*, 8 P.R. 518. The judge could, however, receive the affidavit notwithstanding defects: Rule 237.

The description of the residence of a deponent in an affidavit must be that residence which exists at the time of the swearing of the affidavit: *Button v. O'Neill*, 4 C.P.D. 354.

High Court.—This section expresses the different persons who only have the right to take affidavits in the Division Courts. All affidavits taken by persons other than those mentioned in this section would be void, unless sworn out of the Province, when they may be sworn before any of the persons enumerated in R.S.O. c. 73, s. 37. See also section 87 and notes thereto.

An affidavit sworn before the solicitor or agent of the party on whose behalf it was made, or before the clerk or partner of such solicitor or agent cannot be used: Section 109 (a), *ante* p. 171.

JUDGE'S DECISION.

150. The Judge, in any case heard before him shall, in Court, openly, and as soon as may be after the hearing, pronounce his decision; but if he is not then prepared to pronounce a decision he may postpone it until it is convenient for him to give the same, when he shall forthwith send the same to the Clerk of the Court, who shall upon the receipt thereof by him forthwith enter the judgment and by registered letter notify the parties to the suit of the same; and such judgment shall be as effectual as if rendered in Court at the trial. R.S.O. 1887, c. 51, s. 144; 57 V. c. 23, s. 4.

Judge may give judgment *instantly* or postpone judgment.

Pronounce His Decision.—"Decision" here means the judicial disposal of the case which the judge has heard. The legislature has evidently taken the same view as Jessel, M.R., did,—*"That a judge's decision is best when the facts are fresh in his mind"*—by declaring that he should pronounce a decision in a case tried before him *instantly*. By section 73 this is to be done in a summary way "agreeable to equity and good conscience." See notes to section 17, p. 12 *ante*.

A judge cannot alter his decision at will: *Jones v. Jones*, 5 D. & L. 628; *Irving v. Askew*, L.R. 5 Q.B. 208, unless it does not correctly set forth his meaning: *The Receipts*, (1893) P. 255; but he may do so before he enters it: *Canadian Land & Emigration Co. v. Dysart*, 9 O.R. 495, 512. See also *Re St. Nazaire Land Co.*, 12 Ch. D. 88, 91.

Until it is Convenient.—Formerly it was necessary for the judge to "name a subsequent day and hour" for delivery of judgment "in writing at the clerk's office," and it was held that that provision had to be carefully observed, otherwise prohibition might follow any subsequent attempt to give judgment: see *Forbes v. The Michigan Cent. Ry. Co.*, 20 A.R. 584, at p. 589; *Re Burrows*, 18 C.P. 493; *Re Tipling v. Cole*, 21 O.R. 276; *Re Wilson v. Hutton*, 23 O.R. 29; see also *McPherson v. McFee*, 21 O.R. 280, 411; *Bank of Ottawa v. Wade*, 21 O.R. 486.

But this section relieves the judge from what was found to be a duty often overlooked. He may now simply reserve judgment and send the same, when ready, to the clerk who is bound forthwith to enter judgment without prior notice to the parties.

Rule 161 was introduced for the purpose of overcoming the difficulty before mentioned. But as the rule is inconsistent with the statute, the latter impliedly repeals the former and the rule is therefore inoperative. The same principle applies to the conflict between a rule of the court and a provision of the Act, as is applicable in the case of conflicting enactments. If they are irreconcilable it is to be determined which is the leading and which the subordinate provision, and which must give way to the other. That would be so with regard to enactments and with regard to rules, which are to be treated as if within the enactment. In that case, probably, the enactment, then, would be treated as the governing consideration and the rule as subordinate to it: *per* Lord Herschell, *Institute of Patent Agents v. Lockwood*, (1894) A.C. 347, at p. 360; see *Robinson v. Emerson*, 4 H. & C. 352; *Mitchell v. Brown*, 1 El. & El. at p. 275; *R. v. Rose*, 27 O.R. 195. By Rule 276 the trial of the cause is not concluded until judgment is delivered.

Interest.—The allowance or disallowance of interest is frequently a matter for consideration at the trial. The following enactments bear on

the question: (1) Interest shall be payable in all cases in which it is now payable by law, or in which it has been customary for a jury to allow it: R.S.O. c. 51, section 113. This section was originally 7 Wm. IV. c. 3, section 20. The concluding clause is not in the English Statute, 3 and 4 Wm. IV. c. 42. At common law interest was not payable on ordinary debts unless by agreement or mercantile usage; nor could damages be given for non-payment of such debts: *Higgins v. Sargent*, 2 B. & C. 348; *Page v. Newman*, 9 B. & C. 378; *Foster v. Weston*, 6 Bing. 709; but an implied contract to pay interest may be raised from the dealings between the parties, as where the debtor has been in the habit of paying interest upon such or similar securities: *Ex parte Williams*, 1 Rose, 399; *Newell v. Jones*, 4 C. & P. 124; and a partner could not be charged interest on an overdrawn account; *Rhodes v. Rhodes*, Johns. 653; 6 Jur. N.S. 600; see *Rishton v. Grissell*, L.R. 10 Eq. 393; but a surety could charge interest on a sum he had been compelled to pay: *Petre v. Duncombe*, 2 L.M. & P. 107; 15 Jur. 86; *Wellington County v. Wilmot Township*, 17 U.C.R. 82; *Hitchman v. Stewart*, 3 Drew. 271; *Ex parte Bishop*, 15 Ch. D. 400; and so might an agent who had advanced money for his principal in mercantile business: *Bruce v. Hunter*, 3 Camp. 467; and where, but for the breach of his agreement, the defendant would have become liable for a debt bearing interest in an action for such breach, interest may be awarded; *Rhodes v. Selsey*, 2 Beav. 359; *McIntosh v. G. W. Ry. Co.*, 4 Giff. 696; s. c. 2 Mac. & G. 74; *Lond. Chat. & Dover Ry. Co. v. S. E. Ry. Co.*, (1892) 1 Ch. 120; (1893) A. C. 429; *Marshall v. Poole*, 13 East. 101; *Farr v. Ward*, 3 M. & W. 25. Money due on an account stated will not bear interest except payable on a particular day or by usage shown in the account: *Nichol v. Thompson*, 1 Camp. 52 (n); *Pinhorn v. Tulkington*, 3 Camp. 468; *Chalie v. York*, 6 Esp. 45; or the account stated is for money lent, or between merchant and merchant; *Blaney v. Hendricks*, 2 W. Bl. 761; or the action is upon an award of a sum payable at a certain time; *Towsley v. Wythes*, 16 U.C.R. 139; *Churcher v. Stringer*, 2 B. & Ad. 777; or is a liquidated demand for work done; *Smart v. Niagara and Detroit Co.*, 12 C.P. 404; or is for wages; *McCullough v. Newlove*, 27 O.R. 627; or is for money improperly retained by a sheriff; *Michie v. Reynolds*, 24 U.C.R. 303; or improperly used in his business by an agent; *Landman v. Crooles*, 4 Gr. 353; but where, though an agent's accounts were found to be inaccurate, there was no fraudulent dealing with the money, nor any wilful withholding of accounts or fraudulent falsification of them, interest was disallowed; *Turner v. Burkinshaw*, L.R. 2 Ch. 488; *Re Kirkpatrick*, *Kirkpatrick v. Stevenson*, 10 P.R. 4; and where no debt is payable until the amount is ascertained either in the manner provided for by an agreement or in an action, interest cannot be allowed; *McCullough v. Clemow*, 26 O.R. 467.

In practice interest is much more frequently allowed by our juries than English authority would seem to warrant. In this case the court struck the interest out of the verdict: *Spence v. Hector*, 24 U.C.R. 277.

(2) On the trial of any issue, or any assessment of damages upon any debt or sum certain payable by virtue of a written instrument at a certain time, interest may be allowed to the plaintiff from the time when the debt or sum became payable: R.S.O. c. 51, section 114. The contract must ascertain the sum and the time; the certainty of both must appear from the contract, but if all the elements of certainty appear by the contract, and nothing more is required than a mathematical computation to ascertain the exact sum or the exact time for payment, that will be sufficient: *Merchant Shipping Co. v. Armitage*, L.R. 9 Q.B. 99; *Lond. Chat. & Dover Ry. Co. v. S. E. Ry. Co.*, (1892) 1 Ch. 120, 144, 148, (1893) A.C. 429; *McCullough v. Clemow*, 26 O.R. 467. The case of *Duncombe v. Brighton Club & Norfolk Hotel Co.*, L.R. 10 Q.B. 371,

must be treated as not good law. A mere application for a loan till a fixed day, but containing no obligation to repay, is insufficient, though the loan is made on the terms of the application: *Taylor v. Holt*, 3 H. & C. 452. The allowance of the interest is discretionary: *Hill v. South Staffordshire Ry. Co.*, L.R. 18 Eq. 170. The statute is not applicable to cases where a recovery is sought, not against a defendant personally, but against his estate; and except under extraordinary circumstances, upon particular grounds suggested, of hardship or peculiarity, interest is not to be allowed upon the arrears of an annuity: *Snarr v. Badenach*, 10 O.R. 131.

(3) If payable otherwise than by virtue of a written instrument at a certain time, interest may be allowed from the time when a demand of payment is made in writing informing the debtor that interest will be claimed from the date of the demand: R.S.O. c. 51, section 114, subsection 2.

Demand held sufficient, see *Mowat v. Londesborough*, 4 E. & B. 1; *Mildmay v. Methuen*, 3 Drew. 91; *Ex parte Lintott*, L.R. 4 Eq. 184; *Edwards v. G. W. Ry. Co.*, 11 C.B. 588; *Re Overend, Gurney & Co.*, *Barron's case*, L.R. 3 Ch. 784. A claim of interest on the summons is an insufficient demand: *Rhymney Ry. Co. v. Rhymney Iron Co.*, 25 Q.B.D. 146.

The demand must be in writing: *Inglis v. Wellington Hotel Co.*, 29 C.P. 387. A solicitor may give notice that he will claim interest on his bill of costs delivered to his client from the date of the notice: *Berrington v. Phillips*, 1 M. & W. 48; *Re McClive*, 9 P.R. 213.

(4) In actions for conversion of goods or for trespass *de bonis asportatis*, the jury may give interest in the nature of damages, over and above the value of the goods at the time of the conversion or seizure; and in actions on policies of insurance, may give interest over and above the amount recoverable thereon: R.S.O. c. 51, section 115.

Interest need not be claimed nor special damage laid: *Paine v. Pritchard*, 2 C. & P. 558. On a policy of insurance interest can only be allowed for the wrongful detention of money which ought to have been paid; and when, for want of administration, there was no person clothed with a legal title to the money, interest was disallowed: *Webster v. British Empire Mut. Life As. Co.*, 15 Ch. D. 169; *Toronto Savings Bank v. Canada Life Ass. Co.*, 14 Gr. 509.

Compound interest is never allowable except by express or implied contract: *Fergusson v. Fyfe*, 8 Cl. & F. 121; *Atwood v. Taylor*, 1 M. & G. 279; *Daniel v. Sinclair*, 6 App. Cas. 181.

Where payments are made and not specifically appropriated to the principal, they may be applied first in reduction of interest: *McGregor v. Gaulin*, 4 U.C.R. 378; *Bettes v. Farewell*, 15 C.P. 450; *Ross v. Perrault*, 13 Gr. 206; *Barnum v. Turnbull*, 13 U.C.R. 277; *Cummings v. Usher*, 1 P.R. 15.

In England a County Court judgment does not bear interest: *R. v. Judge of Essex, C.C.*, 18 Q.B.D. 704; but a Division Court judgment probably bears interest under section 7, but certainly, if execution is resorted to for collection of a judgment, interest may be levied under section 218. Under section 151 and Rule 125, unless the judge otherwise orders, no sum is payable on a judgment or order until fifteen days after the decision is rendered, except judgment be entered by default under section 109 or summarily under section 116.

Unless otherwise ordered by the court, a verdict or judgment of the High Court, bears interest from the time of the rendering of the verdict or the giving of the judgment, as the case may be, notwithstanding that

the entry of judgment shall have been suspended by any proceedings in the action whether in the court in which the action is pending or in appeal: R.S.O. c. 51, s. 116.

See *McLaren v. Canada Central Ry. Co.*, 10 P.R. 328; *Talbot v. Canadian Colored Cotton Co.*, 17 C.L.T. 336.

Where a bill is dishonored, the holder may recover from any party on the bill, and the drawer may recover from the acceptor, and the indorser who has been compelled to pay may recover from the acceptor, or from the drawer or from a prior indorser, interest from the time of presentment for payment, if the bill is payable on demand, and from the maturity of the bill in any other case: Bills of Exchange Act, 1890, 53 Vic. c. 33, section 57, sub-section 2; see *London Universal Bank v. Clancarty*, (1892) 1 Q.B. 689; *Lawrence v. Willeocks*, (1892) 1 Q.B. 696.

At What Rate.—Where interest is recoverable by virtue of a contract, the rate fixed by the contract will be recoverable, or if no rate is fixed, then at six per cent. But where there is no express contract to pay interest after the principal money becomes due, interest will be allowed only as damages and will be limited to six per cent: R.S.C. c. 127, section 2; *Dalby v. Humphrey*, 37 U.C.R. 514; *St. John v. Rykert*, 10 S.C.R. 278; *Powell v. Peek*, 12 O.R. 492; 15 A.R. 138; *Grant v. Peoples Loan and Deposit Co.*, 17 A.R. 85; 18 S.C.R. 262; *R. v. Grand Trunk Ry. Co.*, 2 Ex. C.R. 132; *Biggs v. Freehold Loan and Savings Co.*, 26 A.R. 232; see *Freehold L. & S. Co. v. McLean*, 2 West. L. T. 143; *Jackson v. Richardson*, 1 N.B. Eq. 325.

Where a contract is to pay principal money and interest, and a judgment is recovered thereon, the contract is merged in the judgment, and interest can only be recovered on the judgment; and the rate will be six per cent.: *Florence v. Drayson*, 1 C.B.N.S. 584; *McKay v. Fee*, 20 U.C.R. 268; *Re European Central Ry. Co.*, 4 Ch. D. 33; *Hanford v. Howard*, 1 N.B. Eq. 241; see section 218, *infra*; but where there is a separate covenant to pay interest so long as the principal shall remain due, judgment may be recovered from time to time for the difference between the interest, at the rate specified in the contract, and the rate paid under the judgment: *Popple v. Sylvester*, 22 Ch. D. 98.

Where G, at the request of the mortgagor, paid the principal and interest due on a mortgage and took an assignment of it, it was held that, in the absence of an express agreement, no interest was chargeable upon the sum paid for interest when the mortgage was assigned: *Thomas v. Girvan*, 1 N.B. Eq. 257. See *London Loan Co. v. Manley*, 26 S.C.R. 443.

Interest on the amount of an award does not begin to run until notice of the award has been given to the defendant: *Huyck v. Wilson*, 18 P.R. 44.

Where an excessive rate is paid after maturity the excess cannot be recovered back or applied in reduction of the principal: *Hutton v. Federal Bank*, 9 P.R. 568; *Stewart v. Ferguson*, 31 O.R. 112.

Five per Cent. a Month.—Under The Interest Act, 1897, 60 & 61 Vic. c. 8 (D): "Whenever any interest is, by the terms of any written or printed contract, and whether under seal or not, made payable at a rate or percentage per day, week, month, or at any rate or percentage for any period less than a year, no interest exceeding the rate or percentage of six per cent. per annum shall be chargeable, payable, or recoverable on any part of the principal money unless the contract contains an express statement of the yearly rate or percentage of interest to which such other rate or percentage is equivalent:" and,

"If any sum is paid on account of any interest not chargeable, payable, or recoverable under the last preceding section, such sum may be

recovered back or deducted from any principal or interest payable under such contract."

This Act does not apply to mortgages or real estate.

Where a money lender advertised, "Money lent at £5 per cent. From £5 to £2000. Why pay more when a private gentleman desires to grant advances to male or female upon their note of hand alone," etc., a bill of sale was given by a borrower as security for the payment of "£100 and interest thereon at the rate of 1s. in the £ per month," an action to set aside the bill of sale for fraud was dismissed: *Linfoot v. Pocket*, (1895) 2 Ch. 835. *Lindley, L.J.*, said: "The advertisement was that money could be had for '5 per cent.,' but 5 per cent. in a money lender's mind means 5 per cent. per month and 5 per cent. in a borrower's mind means 5 per cent. per annum until he finds out what it really means; and of course when this plaintiff found out what it really meant he did not like it. However, that is immaterial, because it was in fact 60 per cent. . . . Although the plaintiff was foolish enough to be attracted by this advertisement he was a man of some intelligence and quite capable of reading what he signed and as he chose to sign this document which is perfectly clear and intelligible, his case falls."

Special Statutory Enactments.—Except in a mortgage of real estate, no written or printed contract for a greater percentage than 6 per cent. per annum will now be good, unless the percentage per annum is stated. But a contract for payment of any stipulated yearly percentage will still be good: R.S.C. c. 127, s. 1, except:

(1) A pawnbroker may take 2 per cent. per month up to \$20, and five cents for every \$4 per month when the sum lent exceeds \$20: R.S.C. c. 128, ss. 2, 3.

(2) A chartered bank may take, reserve or exact any rate of interest or discount not exceeding 7 per cent. and may receive and take in advance any such rate, but no higher rate of interest shall be recoverable by the bank: 53 Vic. c. 31, s. 80 (D).

(3) Principal money or interest in arrear upon a mortgage of real estate may bear interest at the same rate as principal money not in arrear, but not at any greater rate: R.S.C. c. 127, s. 5.

(4) Where by a mortgage of real estate the principal money or interest are payable on the sinking fund plan, or any plan under which the payments of principal money and interest are blended, or on any plan which involves an allowance of interest on stipulated repayments, no interest whatever is chargeable unless the mortgage shows the real rate calculated yearly or half-yearly not in advance: R.S.C. c. 127, s. 3; R.S.O. c. 205, ss. 20-25.

(5) Corporations incorporated before 16th August, 1858, authorized to lend or borrow money are, with certain exceptions, limited to six per cent. per annum: R.S.C. c. 127, s. 10; R.S.O. c. 205, s. 23.

Special Judgments.—All special judgments or orders shall be prepared by the clerk or such other person as the judge shall direct. Either party dissatisfied with the judgment or order as so prepared may apply to the judge by motion to vary and finally settle the same; but except by leave of the judge, such notice shall not operate as a stay of proceedings. The judgment or order when finally settled shall be filed, and a minute of such filing, with the date thereof, shall be entered in the procedure book: Rule 138.

It is impossible to define what is meant by "special judgments or orders." Many ordinary judgments and orders are not included in the forms prescribed by the rules, yet they are in no sense special. It is probable that a special judgment or order is one which is not common in

Division Court proceedings, or in which special terms or conditions are inserted which are not ordinarily contained in judgments or orders of a like kind. Judgments under section 75 and the rules applicable thereto would be in special form. Judgments in appeal under The Line Fences Act and the Ditches and Watercourses Act are special judgments within the meaning of Rule 138; Rules 326 and 335. The last mentioned rule is, however, now inapplicable owing to the change of procedure prescribed by the Act of 1894, now R.S.O. c. 285, s. 26.

The rule does not prescribe what is to be done with the order when prepared, whether it is to be signed, nor how the parties interested may ascertain its terms. It is not required to be filed until finally settled. An order which no one is dissatisfied with appears to be treated as one not "finally settled," and is such an order, therefore, not to be filed? The rule would have been clearer if it had required every order signed by the judge to be filed.

Minute of Filing.—The order and judgment will take effect from the date of being pronounced, not from the date of filing. Every judgment and order must be entered in the procedure book: Rule 125.

PROCEEDINGS BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

Definition.—The word "executor" includes, "of the last will and testament," and extends to a party acting in his own wrong; and the word "administrator" embraces and means "of the property of:" Rule 2 (4). An executor "acting in his own wrong" is one who is neither executor nor administrator and who intermeddles with the goods of the deceased or does any other act characteristic of the office of executor and thereby makes himself what is called in law an executor of his own wrong, or more usually an executor *de son tort*: Williams on Executors, 9th ed., 208.

Executor De Son Tort.—The question whether a party has made himself an executor *de son tort* is one of mixed law and fact. The jury find the facts, and the court says whether these facts constitute an executorship: Padget v. Priest, 2 T.R. 97; 1 R.R. 440; Haacke v. Gordon, 6 U.C.R. 424.

A person who takes goods of a deceased under a fair claim of title is not an executor *de son tort*: Merchants' Bank v. Monteith, 10 P.R. 467.

An executor *de son tort* cannot give a new start to the Statute of Limitations: Grant v. McDonald, 8 Gr. 478. Lands cannot be sold under a judgment against such an executor: McDade d. O'Connor v. Dafoe, 15 U.C.R. 386; Wrothwell v. Bates, 15 U.C.R. 391; Graham v. Nelson, 6 C.P. 280; but leaseholds may be sold: Bain v. McIntyre, 17 C.P. 500; though not under a Division Court execution: Duggan v. Kitson, 20 U.C.R. 316.

A purchaser of goods from an executor *de son tort* is not subject to the liability of such an executor: Merchants' Bank v. Monteith, 10 P.R. 467; but the seller must be really acting as executor and the party with whom he deals must have fair reason for supposing he has authority to act as such: Mountford v. Gibson, 4 East 411; 7 R.R. 509; Thomson v. Harding, 2 E. & B. 630; Buckley v. Barber, 6 Ex. 164.

An infant is not liable for a devastavit as an executor *de son tort*: Young v. Purves, 11 O.R. 597.

An action may be revived against the executor *de son tort* of a defendant: Keena v. O'Hara, 16 C.P. 435.

Particulars Now Required.—A party suing an executor or administrator, may charge in the summons (Form 50) that the defendant has had assets, and has wasted them, and he shall state in his particulars the amount of

assets alleged to have been left by the deceased, and the manner in which the said assets have been wasted: Rule 89.

To Form 50 must be added a statement to the following effect, according to the facts: "The plaintiff says that the deceased left assets to the amount of \$, and that the defendant wasted them in the following manner: [By applying them to his own use; or by not calling in money invested on a mortgage, the security of which was insufficient (giving particulars); or by investing moneys on personal security (giving particulars); or by investing money on unauthorized security (giving particulars); or by loaning the sum of \$ to A.B., his co-executor, who has failed to return the same.]"

If the plaintiff sues, or the defendant is sued, in a representative capacity, it shall be stated in the particulars of claim in what capacity the plaintiff sues or the defendant is sued: Rule 100 (a).

This rule applies to an assignee in insolvency as well as to executors and administrators. A statement of the representative capacity cannot be furnished in plaintiff's affidavit on a motion: *Hynes v. Fisher*, 4 O.R. 78.

Definition of Devastavit.—Devastavit is defined as a mismanagement of the estate and effects of the deceased in squandering and misapplying assets contrary to the duty imposed on them for which executors or administrators shall answer out of their own pockets as far as they had or might have had assets of the deceased. An executor may pay a debt which is barred by the Statute of Limitations: *Hill v. Walker*, 4 K. & J. 160; *Stahlsmidt v. Lett*, 1 Sm. & G. 415; but not if his co-executor objects thereto: *Midgley v. Midgley*, (1893) 3 Ch. 282. And if on competent advice he pays a claim *bona fide* made against the estate the money paid is not, on his death, even though paid under a mistake in law, an unadministered asset so as to vest in an administrator *de bonis non* a right of action to recover it back: *Mayhew v. Stone*, 26 S.C.R. 58. But it is clearly his duty not to waste an estate not his own, which he is administering for the benefit of others, in satisfying demands that are equally untenable at law and in equity. If the liability is claimed under a contract not enforceable by reason of the Statute of Frauds, there is no debt or liability which he would be justified in paying: *Re Rowson*, 29 Ch. D. 358; *Re Williams*, 27 O.R. 405: see *Williams on Ex.* 9th Ed., 1699.

Deficiency of Assets.—By R.S.O., c. 129, s. 34, all debts of a deceased are now payable ratably if there is insufficient to pay all in full. Paying one creditor in full would therefore be, as a general rule, an admission by the executor that he had assets sufficient to pay all creditors: *Bank of British North America v. Mallory*, 17 Gr. 102; *Chamberlen v. Clark*, 1 O.R. 135; 9 A.R. 213. If he is sued and does not defend, on the ground that assets are deficient, he will be guilty of a devastavit to the amount of the excess over the ratable share which the creditor would have been entitled to: *Taylor v. Brodie*, 21 Gr. 607. If he knows of the deficiency, it seems he cannot recover the excess from the creditor who received more than his proper share: *Doner v. Ross*, 19 Gr. 229; but if he believed there would be no deficiency, he is entitled to recover the excess back as money paid under a mistake of fact: *per Burton, J.A., Chamberlen v. Clark*, 9 A.R. 281. But see *Leitch v. Molsons Bank*, 27 O.R. 621, in which it was held that an administratrix after advertising for creditors, and assuming from the claims filed that assets were sufficient, paid a creditor in full, she had no *locus standi* to maintain an action to recover the excess. See also *Taylor v. Brodie*, 21 Gr. 610. If the executor is insolvent and a creditor has received from him, or from the estate, either with or without proceedings, more than his proper share, the other creditors will be entitled to a direct recovery from him of the excess:

Chamberlen v. Clark, 1 O.R. 135; 9 A.R. 273; Bank of British North America v. Mallory, 17 Gr. 102. See also "An Executor's Defence of Law," 10 C.L.T. 277.

Advertisement for Creditors.—If an executor has advertised for creditors, pursuant to R.S.O. c 129, s. 38, and has sufficient to pay all claims of which he has notice, and pays them in full, but another creditor subsequently appears, and his claim would, if it had been known, have created a deficiency, the executor may plead his notice to creditors and distribution of the assets, and that his accounts have been properly audited by the Surrogate Court, and will, upon proving these facts, be entitled to succeed: see Rule 99 (a). The creditor would not, however, be without remedy, but might compel the other creditors to refund ratably the amount which they received in excess of the amount which would have been payable to them had all the claims been known to the executor: see Leitch v. Molsons Bank, 27 O.R. 621; Stewart v. Snyder, 30 O.R. 110.

Proceedings on Deficiency Appearing.—If the executor is sued, and knows or believes the assets will be insufficient for the payment of all the claims in full, he should plead the deficiency. In the High Court administration could then be ordered, but the Division Courts have no power to order administration. The only course to be adopted in a Division Court suit is for the creditor either to refrain from proceeding with the action and allow the executor to distribute the assets, without going to the expense of an administration suit, or, in the event of his persisting with the suit, for the judge to stay the proceedings for a limited time, to enable the executor to apply for an administration order under C.R. 950. The administration order would operate as a judgment in favor of all creditors, and all debts would be paid ratably.

Foreign Creditors.—The claims of creditors living out of the jurisdiction must be taken into account in ascertaining whether or not there is a deficiency: Milne v. Moore, 24 O.R. 456; *Re Kloebe*, 28 Ch.D. 175.

Judgment on Devastavit.—In all cases where the defendant is charged with waste in the summons, if the judge shall be of opinion that the defendant has wasted the assets, the judgment shall be that the debt, or damages and costs, shall be levied of the goods of the testator (if any), and if not, of the goods of the defendant to an amount not exceeding the amount so wasted; and the non-payment of the amount of the demand immediately, on the court finding such demand to be correct, and that the defendant is chargeable in respect of assets, shall be conclusive evidence of wasting to the amount with which he is so chargeable: Rule 90. For form of judgment see Form 113.

Form of Judgment.—Where an executor or administrator denies his representative character or alleges a release to himself of the demand, whether he insists on any other ground of defence or not (Rule 91), or where he admits his representative character and only denies the demand (Rule 92), and judgment is for the plaintiff, the judgment shall be that the amount found due for the demand and costs be levied of the goods of the testator (if any), and if not, as to costs of the goods of the defendant, unless the judge otherwise orders. For form of judgment, see Form 110.

Levied of the Goods of the Testator.—The word "deceased" should have been used instead of the word "testator" in Rules 90 to 99, both inclusive. The English rules use the words *de bonis testatoris*, and the old Division Court rules use the same words, and on the revision too literal a translation has been adopted. It is important for an executor or administrator who has not in his hands assets to satisfy the debt upon which an action is brought against him to plead either a total administration or partial administration of all assets which came to his hands, or a

denial that any assets came to his hands, or a deficiency of assets, or a notice to creditors, etc., as indicated in notes to Rule 89, for it was said, prior to the Judicature Acts, that a judgment against an executor or administrator, whether by default or on demurrer, or upon verdict upon any plea pleaded by the executor or administrator, except *plene administravit* (he has fully administered), or admitting assets to such a sum and *riens ultra* (nothing beyond), was conclusive upon him that he had assets to satisfy such judgment: 1 Wms. Saund. 219 (b); but that if the executor pleaded either a general or special *plene administravit*, he was liable only for the amount of assets proved to be in his hands, and judgment against an executor on a verdict upon *plene administravit* was only an admission of assets to the extent of assets proved to be in his hands: *Cousins v. Paddon*, 2 C. M. & R. 558, and the Judicature Act has not altered the form of judgment in such cases: *Lince v. Fairecloth*, 14 P.R. 253. If, therefore, judgment be given against the executor where he has omitted to plead *plene administravit*, and execution is issued against the goods of the deceased and is returned *nulla bona*, an action will then lie upon the judgment against the executor suggesting a *devastavit*, and in that action he cannot plead that he has no assets, and judgment will therefore go against him personally, although there may not have been any actual waste of assets: *Erving v. Peters*, 3 T.R. 685; 1 R.R. 794. In that case Lord Kenyon, C.J., said: "It seems extraordinary that the judgment in the first action should not be a judgment *de bonis propriis*, if the executor be liable at all events, whereas the judgment is as to the debt *de bonis testatoris*, and as to the damages *de bonis testatoris et si non de bonis propriis*;" but the principle is put by Mr. Justice Buller in these words: "The simple question is, whether an executor or administrator who has no effects in his hands belonging to the testator, and will not take advantage of that defence at the proper time, shall be permitted to do it afterwards. Now, it is a universal principle of law that if a party do not avail himself of the opportunity of pleading matter in bar to the original action, he cannot afterwards plead it either in any action founded on it or in a *scire facias*."

Judgment Quando Acciderint.—Where the defendant admits his representative character, but denies the demand, and alleges a total or partial administration of assets, and the plaintiff proves his demand, and the defendant proves the administration alleged, the judgment shall be to levy the costs of proving the demand of the goods of the testator, if any, and if not, of the goods of the defendant, unless the judge otherwise orders; and, as to the whole or residue of the demand, judgment of assets when they shall have come into his hands; and the plaintiff shall pay the defendant's costs of proving the administration of assets: Rule 93.

Where the defendant admits his representative character, but denies the demand, and alleges a total or partial administration of assets, and the plaintiff proves his demand, but the defendant does not prove the administration alleged, the judgment shall be to levy the amount of the demand, if such amount of assets is shown to have come to the hands of the defendant, or such amount as is shown to have come to them, and costs, of the goods of the testator, if any, and, if not, as to costs of the goods of the defendant; and as to the residue of the demand, if any, judgment of assets when they shall have come into his hands: Rule 94.

By taking judgment of assets *in futuro*, the plaintiff admits that the defendant has fully administered to that time: 2 Wms. Saund. 219, note (2). On a judgment in this form a summons may afterwards be issued under Rule 97, calling upon the executor to appear touching the allegation of the receipt by him of further assets. The evidence upon this summons will be confined to proof of the executor's receiving assets at a period subsequent to the judgment: *Taylor v. Holman*, Buller's N.P. 169; *Mara v. Quin*, 6 T.R. 1.

Costs When Defendant Succeeds.—Where the defendant admits his representative character and the plaintiff's demand, but alleges a total or partial administration of the assets, and proves the administration alleged, the judgment shall, in case of total administration, be for assets when they shall have come into his hands, and in case of partial administration for such amount as is shown to be in his hands of the goods of the testator, and as to the residue of the demand for such goods when they shall have come into his hands, and the plaintiff shall pay the defendant's costs of proving the administration of assets, unless the judge shall otherwise order: Rule 95.

When judgment is given against an executor or administrator for assets when they shall have come into his hands, and he has not failed in any defence he has set up, he cannot be made liable personally for costs, but should obtain his costs (if any) from the plaintiff. The plaintiff will be entitled to judgment for such costs as were necessarily incurred in obtaining judgment, to be paid out of the assets of the debtor when they shall have come to the hands of the executor or administrator.

Where a defendant admits his representative character and the plaintiff's demand, but alleges a total or partial administration of the assets, but does not prove the administration alleged, and has not established any other ground of defence, the judgment shall be to levy the amount of the demand, if so much assets is shown to have come to the defendant's hands, or so much as is shown to have come to them, and costs, of the goods of the testator, if any, and if not, as to costs, of the goods of the defendant; and as to the residue of the demand, if any, judgment of assets when they shall have come into his hands: Rule 96.

Scire Facias After Judgment Quando Acciderint.—Where judgment has been given against an executor or administrator, that the amount be levied upon assets of the deceased, when they shall have come into his hands, the plaintiff or his personal representative, may issue a summons (Form No. 53), and if it shall appear that assets have come to the hands of the executor or administrator since the judgment, the judge may order that the debt, damages and costs be levied of the goods of the testator, if any, and if not, as to the costs, of the goods of the defendant, provided that it shall be competent for the party applying, to charge in the summons that the executor or administrator has wasted the assets of the testator or intestate, in the same manner as in Rule 89, and the provisions of Rule 90, shall apply to such inquiry; and the judge may, if it appears that the party charged has wasted the assets, direct a levy to be made, as to the debt and costs of the goods of the testator, if any, and if not, of the goods of the defendant: Rule 97.

In charging a devastavit of assets which have been received since the judgment, it is necessary for the plaintiff to give particulars of the assets alleged to have been received, and of the manner in which they have been wasted. If it appear that the executor or administrator has received some assets, but that the same are insufficient to satisfy the judgment, the judgment will be for the plaintiff as to the assets received, and *quando acciderint* as to the residue of the debt: Williams on Executors, 9th ed., 1871.

Payment Into Court.—Where a defendant admits his representative character and the plaintiff's demand, and that he is chargeable with any sum in respect of assets, he shall pay such sum into Court, subject to the rules relating to payment into court, in other cases. Rule 98.

The rule is expressed in the imperative, but it is not intended that a failure to pay into court shall render the defendant liable, except to execution in the ordinary way. Under section 131 it is necessary for the defendant to pay the costs to the time of making the payment. If the executor should not pay into court in accordance with this rule, he would

not be allowed any additional costs on passing his accounts. As to payment into court: see section 131, Rules 171, 244, 245, 246; see also 62 Vic. c. 15 s. 3.

General Provisions.—In actions against executors and administrators, for which provision is not hereinbefore specially made, if the defendant fails as to any of his defences, the judgment shall be for the plaintiff, as to his costs of disproving such defence, and such costs shall be levied of the goods of the testator, if any, and if not, of the goods of the defendant, unless the judge otherwise orders: Rule 99.

Notice to Creditors.—In case an executor or administrator pleads his notice to creditors and distribution of assets, he must give notice of such defence, and that there has been a proper audit of the accounts of his administration: Rule 99 (a).

A proper notice to creditors is one such as would be inserted by the High Court in an administration action. It must give notice that after a certain date creditors who do not send in claims will be excluded from participation: *Stewart v. Snyder*, 30 O.R. 110. The advertisement should be inserted in one or more newspapers at or near the place or places where the deceased lived or carried on business, and if there is reasonable ground for supposing there are foreign creditors a notice should be advertised in the foreign country also: *Wood v. Weightman*, L.R. 13 Eq. 434; *Newton v. Sherry*, 1 C.P.D. 246; *Re Bracken*, 43 Ch. D. 1; *Daniels' Ch. Pr.*, 6th ed., 1014. It is not necessary to insert the advertisement in the *Ontario Gazette*: *Re Cameron*, *Mason v. Cameron*, 15 P.R. 272, unless the localities in which the creditors reside are unknown: *Stewart v. Snyder*, 30 O.R. 110.

Costs Where Plaintiff Fails.—In actions by executors or administrators, if the plaintiff fail, the costs shall, unless the judge shall otherwise order, be awarded in favor of the defendant, and shall be levied of such goods as the judge shall direct: Rule 100.

Executors or administrators instituting actions are subject to the same rules as to costs as they would be if they were suing in their own right: *Daniels' Ch. Pr.*, 6th ed., 1175; *Macdonald v. Balfour*, 20 A.R. 404. In most cases it will be proper to order that the costs should be levied of the goods of the deceased, if any, and, if not, of the goods of the defendant.

Actions on Behalf of Cestuis Que Trust.—Trustees, executors or administrators may sue or be sued on behalf of or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons: but the judge may, at any stage of the proceedings, order any of such persons to be made parties to the action, either in addition to, or in lieu of, the previously existing parties thereto: Rule 100 (b); see C.R. 193; *Holmested & Langton*, pp. 317-322.

Joinder of Claims.—Claims by or against an executor or administrator, as such, may be joined with claims by or against him personally, provided the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator: Rule 100 (c); see C.R. 235. The joinder of claims was not possible under the former practice, and difficulties arose in deciding whether the executor should be proceeded against in his representative capacity or personally. Where the testator was indebted to the plaintiff, and after his death the executor has become indebted to the same creditor, the two claims should be joined in the same action: *Johnson v. Burgess*, 47 L.J. Ch. 552.

The grounds of his claim should be separately stated in the particulars, and the relief which he claims in respect of each claim should be

stated separately. Where a plaintiff is suing in his personal capacity, the defendant cannot counterclaim against him for debt due by him as executor: *Maedonald v. Carrington*, 4 C.P.D. 28.

Judge may direct times and proportions in which judgment shall be paid.

151. The Judge may order the time or times and the proportions in which any sum and costs recovered by judgment of the Court shall be paid, reference being had to the day on which the summons was served, but unless otherwise ordered, no execution shall issue on any such judgment within fifteen days after the entering of such judgment, and at the request of the party entitled thereto, the Judge may order the same to be paid into Court. R.S.O. 1887, c. 51, s. 145, part.

May Order Time or Times.—If made at the time of judgment this order forms part of it: *Robinson v. Gell*, 12 C.B. 191; *Ely v. Monte*, 5 Ex. 918. When any order is made for the payment of any debt, damages, costs or other sum of money the same shall be made payable at the office of the clerk: Rule 125. See section 153; Rule 128; notes *infra* p. 291.

Within Fifteen Days.—This means exclusive of the day of delivery of judgment: *Rudcliffe v. Bartholomew*, (1892) 1 Q.B. 161; see notes to section 109. This provision was originally introduced into Division Court practice by Rule 149 of the original rules, and is now prescribed by Rule 125 of the Revised Rules and Orders of the Division Courts. The terms of the rules were apparently overlooked, and in 1889 the limit of fifteen days was re-enacted by the legislature. This prohibition does not apply to judgment by default under section 113, nor to summary judgment under section 116: see Rules 125, 130 and 131 and notes to sections 113 and 116. See also notes to section 150.

Judgments and Orders to be Minuted.—Every judgment and order of the court shall be entered by the clerk in the procedure book according to the Forms 77 to 131 inclusive, or to the like effect: Rule 125. See also Rule 138 and notes to section 150 as to special judgments and orders.

New trial.

152.—(1) The Judge, upon the application of either party, within fourteen days after the trial, or after the mailing of the notice of the decision to the party applying where the decision is not given at the trial, and upon good grounds being shown, may grant a new trial upon such terms as he thinks reasonable, and in the meantime may stay proceedings. R.S.O. 1887, c. 51, s. 145, part; 52 V. c. 12, s. 16.

Judgment on application for new trial.

(2) Upon an application for a new trial the Judge, instead of granting a new trial, may pronounce the judgment which in his opinion ought to have been pronounced at the trial, and may order judgment to be entered accordingly. R.S.O. 1887, c. 51, s. 146.

New Trials.—Application for new trial may be made *viva voce* and determined on the day of the hearing, if both parties be present; but if made at any other time it must be in writing and show briefly the grounds on which it is based, which grounds, if matters of fact requiring proof, shall be supported by affidavit: Rule 283; see also Rule 251. The grant-

ing of a new trial without an affidavit is not, however, a ground for prohibition: *Fee v. Melhargey*, 9 P.R. 329. The rule is directory only: *Id.*; *Carter v. Smith*, 4 E.& B. 696; see *Jones' Trustee v. Gittens*, 51 L.T. 599. For form of application, see Form 283.

A mandamus may issue to compel a judge to hear an application for a new trial: *Re Moore v. Farquhar*, 15 C.L.T. 103.

If a new trial is granted at the hearing no formal order need be drawn up: Rule 251; see also Rule 243. If made elsewhere than at the hearing a copy of the application and of the affidavit must be served on the opposite party or his solicitor or agent or left at his usual place of business if in the division; if without the division then with the clerk, who is required, on receiving the fees and necessary postage, to transmit the same *forthwith* to the opposite party: Rule 283 (a). The original application and affidavits, and an affidavit of service thereof on the clerk or opposite party (*as the case may be*), must be left with the clerk within 14 days after the trial to be by him transmitted to the judge (on receiving the necessary fees and postage) together with the claim and other papers in the suit: Rule 283 (b). The clerk must, however retain all the papers in his possession for six days in order to permit the opposite party to reply; and at the end of six days he must forward the papers to the judge: Rule 283 (c).

When the evidence has been taken in writing under section 121, the clerk must forward the same to the judge: section 121; see Rules 172, 173; see also sections 156 and 161, and notes thereto.

The delivery of the papers to the clerk operates as a stay of proceedings until the judge's final decision, unless otherwise ordered: Rule 283 (b). Care should be taken to comply with all of the requirements of the rules: see also *McKenzie v. Keene*, 5 U.C.L.J. 225. As to new trial in interpleader proceedings, see section 277.

The provisions of the section do not apply to a garnishee so as to put him on the same footing as a plaintiff or defendant in an action: *Re McLean v. McLeod*, 5 P.R. 467; *Hobson v. Shannon*, 27 O.R. 115; 26 O.R. 554.

Within Fourteen Days.—The application must be made (that is, delivered to the clerk: Rule 283) within 14 days. This means exclusive of the day of entering judgment: see notes to section 90, *ante* p. 144; *Radcliffe v. Bartholomew*, (1892) 1 Q.B. 161. Should the trial take place on the 1st of the month, the application should be complete and delivered to the clerk not later than the 15th of the same month. But where the judge postpones judgment under section 150, the 14 days do not begin to run until the day on which the defendant has notice of judgment: *Re Moore v. Farquharson*, 15 C.L.T. 103.

Time Cannot be Extended.—The time for making the application cannot be extended and a new trial granted on an application made after the expiration of 14 days from the trial: *Mitchell v. Mulholland*, 14 C.L.J. 55; see also *Bell v. Lamont*, 7 P.R. 307; *Re Foley v. Moran*, 11 P.R. 316; *Soules v. Little*, 12 P.R. 533; *Bland v. Rivers*, 19 O.R. 407; *Re McLean v. Osgoode*, 30 O.R. 430; and cases cited *ante* p. 143. But this does not apply to garnishee proceedings: *Re Hobson v. Shannon*, 26 O.R. 554; 27 O.R. 115; *McLean v. McLeod*, 5 P.R. 467; *Forbes v. Michigan Cent. Ry. Co.*, 20 A.R. at p. 587; or where the judge postpones judgment under section 150, in which case the 14 days are to be reckoned from the day of the delivery of judgment: *Moore v. Farquharson*, 15 C.L.T. 103; see Rule 2 (18).

A judge may set aside a judgment for irregularity at any time: *Stewart v. Moore*, 9 U.C.L.J. 82; *Bayley v. Borne*, 1 Str. 392; *Jewell v. Hill*, 1 Str. 499. See also Rule 251. But a stranger cannot apply, even

though an execution creditor: *Nicholls v. Nicholls*, 10 U.C.L.J. 68; *Molsons Bank v. McMeekin*, 15 A.R. 535; unless on the ground of fraud and collusion: see *Balfour v. Ellison*, 8 U.C.L.J. 330; *McGee v. Baird*, 8 U.C.L.J. 233; *Klein v. Klein*, 7 U.C.L.J. 296; *Girdlestone v. Brighton Aquarium Co.*, 3 Ex. D. 137; s.c. 4 Ex. D. 107. Where a judge has decided an application for a new trial and refused to grant it, his authority is at an end; he cannot afterwards grant it on fresh material: *Moxon v. London Tramways Co.*, 60 L.T. 248; s.c. 37 W.R. 132; unless leave has been reserved for that purpose; *ib.*; see *The G.N. Ry. Co. v. Mossop*, 17 C.B. 139; *Coke v. Jones*, 4 L.T. 306; *The Receipta*, (1893) p. 255.

The judge may dispense with notice of motion, and grant the order *ex parte*: *Re Backhouse v. Bright*, 13 P.R. 117, and cases there cited.

An application for a new trial is not a waiver of defendant's right to object to the jurisdiction: *Re Evans v. Sutton*, 8 P.R. 367.

A plaintiff who has taken a nonsuit rather than go to the jury on an unfavorable charge, cannot obtain a new trial: *McGrath v. Cox*, 3 U.C.R. 332; nor if he has taken a nonsuit during the charge: *Fraser v. North Oxford & West Zorra Plank Road Co.*, 15 U.C.R., 291; but see *Bank of Ottawa v. McLaughlin*, 8 A.R. 543.

The withdrawal of a juror does not put an end to the cause. If there has been a breach of the terms on which the juror was withdrawn, the court may re-try the action: *Thomas v. Exeter, Etc., Co.*, 18 Q.B.D. 822; *Norburn v. Hilliam*, 22 L.T. 67; and so if the judge has decided that he has no jurisdiction, but afterwards concludes that his decision was erroneous, he may grant a new trial: *Lister v. Wood*, 23 Q.B.D. 229; and a new trial may be granted where a plaintiff has taken a nonsuit in deference to a judge's ruling: *Burn v. Bletcher*, 14 C.P. 415; *Hatton v. Fish*, 8 U.C.R. 177.

Grounds for Granting New Trial. — What are "good grounds" for granting a new trial is a question for the judge, and his decision will not be reviewed on prohibition, even where he finds misconduct of the jury, without any evidence to warrant it: *Moxon v. London Tramways Co.*, 60 L.T. 248; affirmed in appeal *sub nom. R. v. Greenwich*, C.C. Judge, 37 W.R. 132. But in appealable cases his finding might be set aside, and the judge should not, in unappealable cases, grant a new trial upon other grounds than would be sufficient if his finding were subject to appeal. A new trial should never be granted, except upon grounds which would be sufficient in the High Court: *Murtagh v. Barry*, 24 Q.B.D. 632; *i.e.*, that some miscarriage of justice would ensue unless granted: *Jenkins v. Morris*, 14 Ch. D. 684; *Grieve v. Molsons Bank*, 8 O.R. 162.

The following are grounds for granting a new trial:

1. Improper admission or rejection of evidence.
2. Improper nonsuiting of the plaintiff.
3. Misdirection or non-direction of the jury.
4. Perverse verdict, or verdict against weight of evidence.
5. Verdict too small or too great.
6. Surprise and discovery of new evidence.
7. Improper conduct of opposite party, or of the jury.

The judge has also power to grant a new trial on the ground that his judgment was wrong either in law, or in fact, upon the evidence before him.

Misdirection or Non-Direction. — At common law, upon any improper admission or rejection of evidence or any misdirection, in point of law, of the jury, a new trial was granted, but the modern rule in the High Court is that a new trial should not be granted on these grounds, unless some substantial wrong or miscarriage has taken place: C.R. 785. This principle of practice may be adopted by the judge in the Division Court: see section 312 *post*.

The onus of showing that no substantial wrong was occasioned is on the party opposing the application: *Anthony v. Halstead*, 37 L.T. 433.

A new trial will not be granted for the improper admission of evidence unless objected to at the trial: *Campbell v. Beamish*, 8 U.C.R. 526; *Eyre v. Highway Board, Etc.*, 8 T.L.R. 648; and if it could be shown that there was sufficient evidence, independently of the evidence improperly admitted, a new trial would be refused: *Appleton v. Lepper*, 20 C.P. 138; *Dundas v. Johnson*, 24 U.C.R. 547; *Cooley v. Smith*, 40 U.C.R. 543; but if the judge commented to a jury on the inadmissible evidence as important, a new trial should be granted: *Bank of Hamilton v. Isaacs*, 16 O.R. 450.

Misdirection can only be in point of law, not on a matter of fact; and the objection must be taken at the trial: *R. v. Fick*, 16 C.P. 379; *Taylor v. Ashton*, 11 M. & W. 401. A judge may tell the jury his own opinion: *Dougherty v. Williams*, 32 U.C.R. 215; *Smith v. Dart*, 14 Q.B.D. 105.

Where the judge misdirects the jury as to the burden of proof, a new trial will be ordered: *Kingston v. Kingston*, (1897) A.C. 509.

If the judge improperly refuses to charge the jury in respect to any particular matter which counsel wishes to have submitted, it amounts to non-direction: *Turner v. Burns*, 24 O.R. 28; *Griffiths v. Boscowitz*, 18 S.C.R. 718; but see *Benner v. Edmonds*, 30 O.R. 676.

To tell a jury to ask themselves, "If I were the plaintiff, how much ought I to be paid if the Company did me an injury?" is not a proper direction: *Hesse v. St. John Railway Co.*, 36 C.L.J. 212.

Non-direction is only a ground for a new trial, where the verdict is against the weight of evidence: *G.W. Ry. Co. v. Braid*, 1 Moo. P.C. 101; 9 Jur. N.S. 339.

Where the judge leaves a question to the jury, which he ought to decide himself as a point of law, a new trial should not be granted unless the objection was taken at the trial: *Doe d. Strickland v. Strickland*, 8 C.B. 725.

Improper Nonsuit.—Where a nonsuit is set aside in a case tried by a jury, the defendant is entitled to a new trial for the purpose of calling evidence; but where the action is tried by a judge, he is not so entitled, and the judge may enter judgment under sub-section (2) *supra*, for the plaintiff: *Maedonald v. Worthington*, 7 A.R. 531.

A nonsuit granted without the plaintiff's consent on the opening speech of counsel will be set aside: *Fletcher v. London & N.W. Ry. Co.*, 1 Q.B. 122.

Verdict Against Evidence.—Where there is evidence upon which the jury might reasonably find the verdict, a new trial will not be granted: *Webster v. Friedeberg*, 17 Q.B.D. 736; *Metropolitan Ry. Co. v. Wright*, 11 App. Cas. 152; *Jones v. Spencer*, 70 L.T. 536; *Commissioners of Railways v. Brown*, 13 App. Cas. 133; *Phillips v. Martin*, 15 App. Cas. 193; see *Grieve v. Molsons Bank*, 8 O.R. 162; *Malcolmson v. Hamilton P. & L. Socy.*, 10 A.R. 610; *Heintzman v. Graham*, 15 O.R. 137; *Ferrand v. Bingley*, 8 T.L.R. 70; *Beckett v. G.T. Ry. Co.*, 13 A.R. 184; *Logg v. Elwood*, 14 A.R. 496; *Brisbane v. Martin*, (1894) A.C. 249; *Australian Newspaper Co. v. Bennett*, (1894) A.C. 284.

Where the credibility of a witness was left to a jury and they found a verdict against his evidence, although his credit had not been impeached by any evidence, a new trial was refused: *Lacey v. Forrester*, 3 Dowl. 668.

Verdict too Small.—A new trial will be granted where the jury have manifestly not considered all the elements of damage: *Phillips v. London & S.W. Ry. Co.*, 5 Q.B.D. 78; but it is unusual to grant a new

trial in any action of tort on the ground of the smallness of the damage: *Mostyn v. Coles*, 31 L.J. Ex. 151.

Verdict too Great.—Where the damages awarded are excessive, the court may reduce them, with the consent of the plaintiff alone, without granting a new trial: *Belt v. Lawes*, 12 Q.B.D. 356; *Massie v. Toronto Ptg. Co.*, 11 O.R. 362; *Curran v. Grand Trunk Ry. Co.*, 25 A.R. 407; *Fraser v. London Street Ry. Co.*, 29 O.R. 411; 26 A.R. 383; *Easton v. Brantford Elec. Ry. Co.*, C.P. Divl. Ct., 20th Nov. 1897; see *Crerar v. Holbert*, 17 P.R. 283; *Jenkins v. Morris*, 14 Ch.D. 674. But in actions of contract a new trial will be granted if it is clear that the damages are excessive: *Berry v. Da Costa*, L.R. 1 C.P. 331; *Lambkin v. South-Eastern Ry. Co.*, 5 App. Cas. 352.

In cases of tort, however, a new trial will not be granted on the ground of excessive damages, unless a very clear case is made out: *Lathbury v. Brown*, 10 Moo. 106. And it is not usual to disturb a verdict upon this ground: *Praed v. Graham*, 24 Q.B.D. 53; *Sornberger v. The C.P. Ry. Co.*, 24 A.R. 263; *Ferguson v. Township of Southwold*, 27 O.R. 66; *McCullough v. Anderson*, 27 O.R. 73 (note).

Surprise.—Surprise may be a ground for a new trial, but the party applying must have adopted all reasonable and proper precautions for properly presenting and proving his case. It may consist of the absence of solicitor, counsel or witnesses, or on the ground of testimony being contrary to expectation, or of false or mistaken evidence: see *Kitchen v. Murray*, 16 C.P. 69; *Martin v. Corbett*, 7 U.C.R. 169; *Livingstone v. Gartshore*, 23 U.C.R. 166; *Chadd v. Meagher*, 24 C.P. 54; *Riding v. Hawkins*, 14 P.D. 560; *Townley v. Jones*, 29 L.J.C.P. 299. But a new trial will not be granted unless the court is satisfied that the verdict is substantially wrong: *Thorpe v. Stallwood*, 1 D. & L. 34.

The Discovery of New Evidence may be ground for a new trial but it must be shown that all the relevant facts were not before the court or jury on the trial: *May v. Lee*, 104 L.T. Newspaper, 357; *Synod v. De Blaquiére*, 10 P.R. 11; *Anderson v. Titmas*, 36 L.T. 711; *Rowe v. The G.T. Ry. Co.*, 16 C.P. 500; *Downey v. Patterson*, 38 U.C.R. 513; *Howarth v. McGugan*, 23 O.R. 396; see *Trumble v. Horton*, 22 A.R. 51.

But there should be a reasonable probability that a different verdict will be reached in the second trial: *Anderson v. Titmas*, 36 L.T. 711.

The fresh evidence must be material, and nearly or quite conclusive, and the fact that it could not have been produced at the former trial should be shown: *Id.*: *Rowe v. The G.T. Ry. Co.*, 16 C.P.; *Downey v. Patterson*, 38 U.C.R. 513; *Howarth v. McGugan*, 23 O.R. 396; see *Trumble v. Horton*, 22 A.R. 51.

Where plaintiff was nonsuited on a statement of his counsel of the facts he was prepared to prove, a new trial was granted on payment of costs, upon an affidavit that the witnesses could have proved a more complete case than that presented by counsel: *Edgar v. Knapp*, 1 D. & L. 73. See *Chitty's Archibald*, 14th ed. p. 741. The witness himself should show on affidavit what facts he can prove: *Robinson v. Rapelje*, 4 U.C.R. 289; *White v. Brown*, 12 U.C.R. 477; *Bates v. Chisholm*, 7 C.P. 46; *Longueil v. Cushman*, 24 U.C.R. 602.

There should be an affidavit showing a good cause of action, or defence on the merits, which can be sustained on a new trial, and stating the grounds for the application: *Moore v. Hicks*, 6 U.C.R. 27; *Moore v. Gurney*, 22 U.C.R. 209; *Dow v. Dickenson*, W.N. (1881) 52. It is usually made a condition that the costs of the former trial and of the motion be first paid. Where the action is of a penal character, the court will not grant the plaintiff a new trial except on account of a mistake or misdirection of the judge: *Stinson v. Scollick*, 2 O.S. 217;

Root v. Woodward, 1 U.C.R. 311: or that the verdict is in contravention of law: *Atty.-Gen. v. Rogers*, 11 M. & W. 670. The court will rarely grant a new trial where an issue charging a party with a criminal offence is found in his favor: *Gould v. British Am. Ass. Co.*, 27 U.C.R. 473; but see *McMillan v. Gore Dist. M. F. Ins. Co.*, 21 C.P. 123.

Where the jury answered all the questions submitted by the judge, but their findings were insufficient to justify a verdict for either party, a new trial was ordered, each party to bear his own costs of appeal and new trial: *Fradenburgh v. Haskins*, 12 A.R. 257; *Manitoba Free Press Co. v. Martin*, 21 S.C.R., 518; *Canadian Pacific Ry. Co. v. Cobban*, 22 S.C.R. 132; *Cowans v. Marshall*, 28 S.C.R. 161; see also *St. Denis v. Baxter*, 13 O.R. 41; 15 A.R. 387.

Misconduct.—Attempting to dissuade a witness from giving evidence is such misconduct on the part of a juror as would justify the granting of a new trial: *Laughlin v. Harvey*, 24 A.R. 438.

Misconduct on the part of the jury must be "such as to satisfy the court that the verdict has been determined on without that grave and serious deliberation, that right exercise of judgment, and that total absence from all partiality, so necessary to the proper execution of the important duties of jurymen;" see *Chitty's Archibald*, 14th ed. 737.

Where the plaintiff was proved to have conversed with members of the jury, and either personally, or by another in his interest, treated them to drink, a new trial was ordered: *Stewart v. Woolman*, 26 O.R. 714; see also *Tiffany v. McNee*, 24 O.R. 551.

And where handbills reflecting on the plaintiff's character were distributed in court and shown to the jury on the day of the trial, a new trial was ordered, though the defendant denied all knowledge of the handbills: *Coster v. Merest*, 7 Moo. 87; but the circulation amongst the jurors of a newspaper containing comments calculated to prejudice the fair trial of the action, was held not to be a ground for a new trial when the parties had knowledge of the fact and did not object at the trial: *Tiffany v. McNee*, 24 O.R. 551. If one side is taken by surprise by a fraudulent trick on the part of the other side a new trial will be granted: *Anderson v. George*, 1 Burr. 353; *Hewlett v. Cruchley*, 5 Taunt. 277.

An appeal by counsel to the local prejudices of the jury was held to be a ground for a new trial: *per Robertson, J.*, *Forwood v. City of Toronto*, 22 O.R. 362; but when that objection was not taken at the trial a new trial was refused: *Sornberger v. The C.P. Ry. Co.*, 24 O.R. 263.

The fact that one of the parties has been denied his right of challenge under R.S.O. c. 61, s. 111, or was allowed in spite of protest more challenges than he was entitled to, is a ground for new trial: *Empey v. Carsenallen*, 24 O.R. 658.

Where a new trial is granted, if the order is not appealed from, the question determined by it cannot be re-argued on appeal from the judgment pronounced on the new trial: *Journal Printing Co. v. Maclean*, 23 A.R. 324.

Judgment Which Ought to Have Been Pronounced.—Formerly any mistaken view of law or fact, by the judge, could only be remedied by granting a new trial: *Pryor v. City Offices Co.*, 10 Q.B.D. 504. Under this section and Rule 285, the judge has power to pronounce the judgment which in his opinion ought to have been pronounced at the trial. In order to prevent any "conflict of authority or diversity of action in the exercise of the discretion with which the judge is invested" under this section, Rule 285 provides that the judge "instead of granting a new trial may pronounce the judgment which, in his opinion, ought to have been pronounced by the judge who tried the case, without a jury, and that in that case, only, may he order judgment to be entered accordingly," but that

he has no such discretion or authority in dealing with an application for a new trial and setting aside a verdict of a jury," but that "this rule shall not be construed to prevent a judge upon an application for a new trial, in a jury case, from ordering a nonsuit to be entered, in case he shall be of opinion that he ought to have entered a nonsuit at the trial." The rule adopts the opinion expressed in the first edition of this work. Notwithstanding section 175 (a) there would still seem to be only three courses open to the judge on an application for a new trial, namely: (1) To dismiss the application; (2) to enter a nonsuit; (3) to direct a new trial. The verdict of the jury cannot be altered: *Re Lewis v. Old*, 17 O.R. 611; see also *Re Jones v. Julian*, 28 O.R. 60; *Re Cowan v. Affie*, 24 O.R. 358, cited in notes to section 160. But at the trial he may determine, after having heard the evidence, whether there is in law any evidence to support the plaintiff's case, which ought to be submitted to the jury to pass upon, and if not he may direct a nonsuit or dismiss the action: section 175 a.

Where the parties had agreed to accept the verdict of a majority of the jury it was held that the judge had power to entertain an application for a new trial as the agreement meant no more than that they agreed to accept the verdict of a majority as equivalent to an unanimous verdict: *Groom v. Shuter*, 69 L.T. 293. A nonsuit should not be granted on a motion for a new trial on a ground which if raised at the trial, could have been cured by amendment: *Clark v. Barron*, 6 A.R. 309; *Victoria Corporation v. Patterson*, (1899) A.C. 615.

Proceedings Upon and Subsequent to Application.—If the application be refused, or if the party applying fail to comply with the terms imposed by the judge, the proceedings in the suit shall be continued as if no application had been made: Rule 283 (c) and (d).

The judge may hear the application at the next sittings of the court or at such other time or place as he may appoint: Rule 283 (c). It is imperative on the judge to hear the application, and a mandamus may issue if he should refuse to do so: *Moore v. Farquhar*, 15 C.L.T. 103. The party in whose favor the judgment has been given should immediately after replying to the application take out an appointment if he wants to have the matter disposed of speedily. The decision of the judge shall be delivered to the clerk or transmitted to him by mail, and such clerk shall notify the parties thereof by mail or otherwise and if a new trial be granted, the suit shall be tried at the next sitting of the court, unless the judge shall otherwise order: Rule 283 (c). The notice by the clerk if sent by mail should be registered: Rule 169.

Order May be Made Conditional.—The judge may, in his discretion, make it a condition of granting a new trial that it shall take place before a jury, whether the first trial took place before a jury or not: but if either party required a jury to try the case in the first instance, he shall be entitled to another jury, on depositing the necessary fees for summoning such jury: and in such case the order for the new trial shall direct the summoning of a jury: Rule 283 (e). It seems to be doubtful whether the expense of a jury in a new trial are taxable against the opposite party. Formerly the law was that the costs of a jury could not be taxed against the opposite party: *Re Lewis v. Old*, 17 O.R. 615: but the act was so amended by 57 Vic. c. 23 s. 6 (now incorporated with section 162 of this Act) as to make the deposit required "costs in the cause." The rule providing for a jury on a new trial being granted does not contain the words used in section 162 and possibly the section may be held not to apply. In that case the rule would receive the same construction as in the case above cited.

153. Except in cases where a new trial is granted, the issue of execution shall not be postponed for more than fifty days from service of the summons without the consent of the party entitled to the same, but in case it at any time appears to the satisfaction of the Judge, by affidavit, affirmation or otherwise that a defendant is unable, from sickness or other sufficient cause, to pay and discharge the debt or damages recovered against him, or any instalment thereof, ordered to be paid as aforesaid, the Judge may suspend or stay any judgment, order or execution given, made or issued in the action, for such time and on such terms as he thinks fit, and so from time to time until it appears by the like proof that the temporary cause of disability has ceased. R.S.O. 1887, c. 51, s. 147.

Execution not to be postponed for more than 50 days.

New Trial.—See notes to sections 150 and 157.

Not More Than Fifty Days.—This excludes the day of service: *Young v. Higgon*, 6 M. & W. 49; *McCrae v. Waterloo M. F. Ins. Co.*, 26 C.P. 437; 1 A.R. 218. In fixing the time of payment the date of the service of the summons should always be observed. Unless consented to, the judge has no power to postpone the execution more than fifty days from the date of service of the summons.

Monthly Instalments.—Where, under this section, the judge suspends or stays any judgment, order or execution given, made or issued in the action, and orders the same to be paid by instalments, such instalments shall be payable at such periods as the order directs; and if no period be mentioned, the first shall become due on the 28th day from the day of making the order, and every successive instalment shall become due at a like period of 28 days from the day of the previous instalment becoming due, and such instalments shall be paid to the clerk of the court: Rule 128.

Execution may be amended so as to make it conform to the judgment: *Glass v. Cameron*, 9 O.R. 712.

Affidavit or Affirmation.—See notes to section 90, 103 and 149, and Rules 262 to 269.

Or Otherwise.—See notes to section 115, *ante* p. 193.

Sickness or Other Sufficient Cause.—From "sickness or other sufficient cause," applies only to causes *ejusdem generis* which would prevent the defendant from exercising his industry and so acquiring means to pay. Mere proof of inability to pay is not sufficient to enable the judge to exercise his discretion: *Attenborough v. Henschel*, (1895) 1 Q.B. 833. This case, which was decided since the publication of the first edition of this work confirms the opinion there expressed, that the words "other sufficient cause" are "*ejusdem generis* with the word 'sickness' preceding them, *i.e.*, some cause which would produce temporary disability in the same manner as would sickness:" see *Sandiman v. Breach*, 7 B. & C. 99, *per Tenterden, C.J.*; *Kitchen v. Shaw*, 6 A. & E. 729, *per Denman, C.J.*; *Farquharson v. Imperial Oil Co.*, 29 O.R. 206, as to the rule of construction in similar cases.

The power given to the judge under this section is extensive and unusual, and should be sparingly and cautiously used: 8 U.C.L.J. 264.

"The judge may suspend or stay execution, implying the exercise of

judgment, not arbitrary discretion, but judicial discretion, in view of all the facts. We have no hesitation in saying that the practice of granting *ex parte* suspensions is a monstrous perversion of the true meaning of the clause, and a gross violation of the vital principle of justice;" 9 U.C.L.J. 177. Execution can only be suspended or stayed for one or more of the causes mentioned in the section. It was held that the court could not restrain a plaintiff from levying his debt out of any one of several defendants he pleased: *Zavitz v. Hoover*, M.T. 2 Vio.; nor will the plaintiff be compelled to proceed against the goods of several defendants in succession first exhausting one, and then levying upon the goods of another: *Com. Bank v. Vankoughnet*, 1 Cham. R. 260.

The court or judge has *not* the power to delay a plaintiff's proceedings on an execution to enable defendants to institute an action, and to acquire a position in which they may apply to set-off the judgment to be recovered by them against plaintiff's judgment: *Lynch v. Wilson*, 9 U.C.L.J. 242, *per Draper, C.J.*; *Mason v. Cooper*, 15 P.R. 418; see also *Freeland v. Brown*, 9 U.C.L.J. 299; *Maw v. Ulyatt*, 7 Jur. N.S. 1300; s. c. 5 L.T. 251; *Johnson v. Lakeman*, 2 Dowl. 646; *Thompson v. Parish*, 6 C.B. N.S. 685.

In acting under this section the plaintiff should have notice of the application, and a copy of the affidavit on which it is grounded served upon him, and he should be called upon to show cause against granting a stay in the execution: 8 U.C.L.J. 264; see 6 U.C.L.J. 205; see also notes to section 86, *ante* pp. 119, 120.

But if the plaintiff should be present no notice or summons to show cause would be necessary: *Baird v. Story*, 23 U.C.R. 624; *Watt v. Ligertwood*, L.R. 2 Scotch App. 367 (n); see Rules 243, 251.

APPEALS.

Appeal to
High Court
of Justice.

154.—(1) In case a party to a cause or any of the parties to garnishee proceedings under this Act wherein the sum in dispute upon the appeal exceeds \$100 exclusive of costs, is dissatisfied with the decision of the Judge, upon an application for a new trial, he may appeal to a Divisional Court of the High Court of Justice, and in such case the proceeding in and about the appeal shall be the same as on an appeal from a County Court, except where otherwise provided by this Act, and the terms "party to a cause" and "appellant" in this section and hereafter used shall have the meaning attached thereto in and by section 50 of *County Courts Act*, and shall also include any party to garnishee proceedings and any party added by order of the Judge. R.S.O. 1887, c. 51, s. 148 (1); 51 V. c. 10, s. 2; 58 V. c. 13, s. 47 (1) part.

Rev. Stat.
c. 55.

Appeal in
inter-
pleader pro-
ceedings.

(2) An appeal shall also lie to a Divisional Court of the High Court of Justice from the decision of a Division Court Judge upon an application for a new trial in all actions in which the parties consent to an appeal, and in interpleader, where the money claimed, or the value of the goods or chattels claimed or of the proceeds thereof, exceed \$100, or where

the damages claimed by or awarded to either party against the other or against the Bailiff, exceed the sum of \$60. R.S.O. 1887, c. 51, s. 148 (2); 58 V. c. 13, s. 47 (1) part.

Any Party to a Cause.—Section 50 of the County Courts Act, (R.S.O. c. 55) defines "party to a cause" and "appellant" to include persons suing, or being sued in the name of others, though not mentioned in the record, and persons on whose behalf or for whose benefit any action is prosecuted or defended, as well as parties named in the record. The word "party" is defined in the revised Division Court Rules to mean "a party to a suit or proceeding, and shall include every person served with notice of or attending any proceeding, although not named in the summons or particulars of claim;" Rule 2, (2); see *Judicature Act*, R.S.O. c. 51, s. 2 (8). The phrase "any party to a cause" would therefore include an assignee suing in the name of his assignor and a person who had indemnified a defendant and was defending the action brought against the party indemnified, and a third party would also be included in the rule: see *McAllister v. Bishop of Rochester*, 5 C.P.D. 194; *Piller v. Roberts*, 21 Ch. D. 198; *Eden v. Weardale Iron and Coal Co.*, 34 Ch. D. 223; 35 Ch. D. 287.

A holder of a mechanics' lien, notified to come in and prove his claim under R.S.O. 1887, c. 126, s. 28, was formerly within the rule, but the Division Courts have no jurisdiction in such cases under the present statute governing them: see R.S.O. c. 153, s. 31.

Ordinarily parties to a cause are merely the original parties in an action: *Beawick v. Boffey*, 9 Ex. 315; *Mason v. Wirral Highway Board*, 4 Q.B.D. 459. But a next friend is not a party: *Re Corsellis*, 31 W.R. 114; *Sinclair v. Sinclair*, 13 M. & W. 640; *Dyke v. Stephens*, 30 Ch. D. 189; *Taylor v. Wood*, 14 P.R. 449; nor is a guardian *ad litem*: *Ingram v. Little*, 11 Q.B.D. 257. In *Cameron v. Allen*, 10 P.R. 192, it was held that garnishee proceedings are grafted upon a cause and are merely attached thereto; therefore a garnishee is not a party to a cause: In *Henderson v. Rogers*, 15 P.R. 241, it was held that a person brought into a garnishment proceeding as the person entitled to the fund attached, is a party within section 52 of the County Courts Act, R.S.O. c. 55.

An appeal by parties to garnishee proceedings is expressly allowed under this section, the provision regarding such proceedings having been first introduced by 51 Vic. c. 10. Sub-section 2 also provides for an appeal from the decision of the judge in interpleader proceedings.

No appeal lies from the decision of a judge acting as a *persona designata*: *Re Simpson and Clafferty*, 18 P.R. 402; and cases cited, *ante*, p. 8.

New Trial.—An appeal lies from either the granting or refusal of a new trial: *Pole v. Bright*, 8 T.L.R. 69, (1892) 1 Q.B. 602.

Sum in Dispute.—The "sum in dispute" means the amount claimed in the particulars, not that amount less the sum recovered at the trial: *Petrie v. Machan*, 28 O.R. 504; though in determining the "amount in controversy," on an appeal from the Divisional Court to the Court of Appeal, it is the sum recovered in the action, not the amount claimed by the plaintiff, which decides the right of appeal: see *Allan v. Pratt*, 13 App. Cas. 780; *Hunt v. Taplin*, 24 S.C.R. 459; 30 C.L.J. 459; *Holmsted & Langton*, 126.

The fact that such sum, with interest subsequently accrued, exceeds \$100 will not give a right to appeal: *Foster v. Emory*, 14 P.R. 1.

Quære, if a defendant sets up a counterclaim or set-off for an amount exceeding \$100, though the claim is below that amount, will an appeal lie from the Division Court? See *Smith v. Gill*, (1896) 2 Q.B. 166.

The fact that prohibition may be granted does not necessarily deprive a party of his right to appeal: *Sweetland v. The Turkish Cigarette Co.*, 47 W.R. 511; *Re Rochon*, 31 O.R. 122; and cases cited *ante* p. 62.

The provisions of the English County Court Act are different from those of this Act. Under the English Act an appeal cannot be taken except on questions of law, or the improper admission or rejection of evidence, and for that purpose the Act of 1888, section 121, superadds the requirement that the judge shall take a note of any questions of law raised at such trial or hearing, and of the facts in evidence in relation thereto and of his decision thereon, and of his decision in the action or matter. His decision upon the facts cannot be reviewed: *Cousins v. Lombard Bank*, 1 Ex. D. 404.

And any point of law intended to be ruled upon must be raised in the inferior court: *Rhodes v. Liverpool Com. Inv. Co.*, 4 C.P.D. 425; *Clarkson v. Musgrave*, 9 Q.B.D. 386; *Smith v. Baker*, (1891) A.C. 325.

Under our statute, the judge of the Appellate Court has the right to review the decision of the Division Court on questions of fact as well as of law.

Under Ord. LIX., Rule 8, English County Courts, the Court of Appeal may order the examination of witnesses when no notes have been taken of the evidence in the court below, but care ought to be taken to prevent fresh evidence being given, so that such appeal should not become practically a new trial: *Re The Crescent*, 68 L.T. 556.

See note to section 123 *ante* p. 212, as to reviewing decision and see also *Arpin v. The Queen*, 14 S.C.R. 736; *Schwersenski v. Vineberg*, 19 S.C.R. 243; *City of Montreal v. Lemoine*, 23 S.C.R. 390 and cases cited *infra*.

General Principles of Appeal.—An appeal does not lie in any case unless given by statutory enactment: *R. v. Cashibury* (Jus.), 3 D. & R. 35; *R. v. Hanson*, 4 B. & Ald. 521; *R. v. Stock*, 8 A. & E. 405; *R. v. Recorder of Ipswich*, 8 Dowl. 103.

The creation of a new right of appeal requires legislative authority: *Atty.-General v. Sillem*, 10 L.T. 434; and where that right is so conferred, it is, in the absence of any other statutory provision, the only one that can be taken: *Thomas v. Hilmer*, 4 U.C.R. at p. 528, *per* Robinson, C.J.; *Pattypiece v. Mayville*, 21 C.P. 316; *Re Newton*, 8 Jur. N.S. 495. See notes *infra*.

An Appellate Court does not reverse the decision of a court below it, simply because it might on the facts have come to a different conclusion. The Appellate Court sees that the inferior court is clearly wrong before reversing its decision: *Keena v. O'Hara*, 16 C.P. at p. 438, *per* Richards, C.J.; *The Picton*, 4 S.C.R. 648; *Ryan v. Ryan*, 5 S.C.R. 406; *Grassett v. Carter*, 10 S.C.R. 107; *Prentice v. Consolidated Bank*, 13 A.R. 69; *Symmington v. Symmington*, L.R. 2 Sc. App. 424; *Berdan v. Greenwood*, 20 Ch. D. 769; *How v. London & N.W. Ry. Co.*, (1892) 1 Q.B. 391; see *Gorman v. Dixon*, 26 S.C.R. 87; *Montreal Gas Co. v. St. Laurent*, 26 S.C.R. 176; *White v. Smith*, 28 N.S.R. 5; *Rainville v. The G.T. Ry. Co.*, 25 O.R. 242; 29 S.C.R. 201, and cases there cited.

But an Appellate Court may draw inferences adverse to those of the trial judge from facts that are not really in dispute: *Booth v. Moffatt*, 11 Man. L.R. 25; *Pudsey v. Manufacturers' Accident Ins. Co.*, 29 N.S.R. 124; see s. e. 27 S.C.R. 374; *Hamilton Manufacturing Co. v. Victoria Lumber Co.*, 16 C.L.T. 209. And if a sufficiently clear case is made out the court may allow an appeal on mere questions of fact: *Ib.*; *North British and Mercantile Ins. Co. v. Tourville*, 25 S.C.R. 177.

The Supreme Court has almost always refused to interfere with the verdict of a jury when there was any evidence to warrant it and particu-

larly when the finding of the jury has been affirmed by the Divisional Court and the Court of Appeal: *Grand Trunk Ry. Co. v. Rainville*, 29 S.C.R. 201; affirming 25 A.R. 242; but when it appears that a gross injustice has been occasioned to the appellant, and there is evidence sufficient to justify findings to the contrary, the concurrent findings of both courts below will be reversed on appeal: *City of Montreal v. Cadieux*, 29 S.C.R. 616; *Hamilton Manufacturing Co. v. Victoria Lumber Co.* 16 C.L.T. 209.

The court may also take questions of fact into consideration, and if it clearly appears that there has been an error in the admission or appreciation of the evidence by the court below, its decision may be reversed or varied: *Lefountain v. Beaudoin*, 28 S.C.R. 89.

The Appellate Court will not interfere with the amount of damages assessed by the judgment appealed from, if there is evidence to support it: *Montreal Gas Co. v. St. Laurent*, 26 S.C.R. 176; *The City of St. Henri v. St. Laurent*, 26 S.C.R. 176. Nor will such court give effect to mere technical grounds of appeal against the merits, when there has been no surprise or disadvantage to the appellant: *Gorman v. Dixon*, 26 S.C.R. 87.

In a case tried without a jury, if evidence has been improperly admitted, the Appellate Court may yet reject it and maintain the verdict if the remaining evidence warrants it: *Merritt v. Hepenstall*, 25 S.C.R. 150.

An appeal does not lie from an order of the judge imposing a fine, under section 284, for an assault on a bailiff or his assistant while in execution of duty: *Lewis v. Owen*, (1894) 1 Q.B. 102.

Statutes Relating to Appeals.—The Act relating to appeals from the County Court is made the basis of appeal under the statute, so that reference to it will be necessary for a proper understanding of the appeal clauses of this Act. The statute made specially applicable to this section is R.S.O. c. 55, of which section 50 is given *supra* p. 293. The only other section of that Act which it is necessary here to mention in connection with this is section 53, and is as follows:

"53. An appeal may be had from any appealable decision of a County Court Judge, notwithstanding judgment has been signed thereon."

When an Appeal Lies.—Prior to 1895, an appeal could be taken from the Division Court direct to the Court of Appeal, and an unsuccessful defendant in a Division Court suit was better off than he would have been in the High Court for "he could promptly and with little expense crave the highest opinion in the province by having recourse to the Court of Appeal: *per* Falconbridge, J., *Gegg v. Adams*, 9 C.L.T. 311; 10 C.L.T. 2. But by 58 Vic. c. 47, s. 1, the tribunal for hearing such appeals was changed to a Divisional Court of the High Court of Justice. The right to appeal depends on statutory provisions, and if they are not complied with the appeal cannot be heard: *North Ontario Election Case*, *Wheeler v. Gibb*, 3 S.C.R. 374; *Owen v. Sprung*, 28 O.R. 607; *Johnson v. Petrolea*, 17 P.R. 332; *Gilmour v. McPhail*, 16 P.R. 151; *McArron v. Metropolitan Life Ins. Co.*, 35 C.L.J. 421; *Smith v. Hay*, 35 C.L.J. 421.

As previously remarked, the Appellate Court has under this section a power of review, not only over the law, but the facts of any case brought before it.

There is no appeal direct from the judge's decision on the trial of a cause, but only *after* he has decided "an application for a new trial": *Côté v. Halliday*, 17 C.L.T. 53.

It is submitted that no appeal will successfully lie against the reasonable exercise of the discretion of the judge: *Goodes v. Cluff*, 13 Q.B.D. 694; *Virtue v. Hayes*, 9 C.L.T. 207; *Nelson v. Thorner*, 11 A.R. 616;

Geary v. Saxton, 28 N.S.R. 278; Ferguson v. Reid, 33 N.S.R. 580; Smith v. City of St. John Ry. Co., 28 S.C.R. 603; Inchemaree v. The Astria, 6 Can. Ex. C.R. 178, 218. In Manning v. Ashall, 23 U.C.R. 302, the appeal was against the granting of a new trial because "the verdict was against evidence, or at all events against the greater preponderance of evidence." Draper, C.J., in delivering the judgment of the court said: "The decision involved no point of the law, strictly speaking, and certainly does not decide the questions which were argued before us. We think we should not give effect to an appeal from a decision of a judge of a County Court on a point like this which is so truly an exercise of discretion by one who, having presided at the trial, and seen and heard the witnesses, is in a much more favorable position to decide correctly than this court can be:" see also Williams v. Jones, 34 Ch. D. 120; Bazett v. Morgan, 24 Q.B.D. 48; Platt v. G.T. Ry. Co., 12 P.R. 380; Jones v. Tuck, 11 S.C.R. 197; R. v. Richardson, 8 O.R. 651; Eureka Woollen Co. v. Moss, 11 S.C.R. 91; but see R. v. Meyer, 11 P.R. 477.

At the trial the plaintiff elected to take a nonsuit and the judge refused a new trial; it was held that the case was appealable: Bank of Ottawa v. McLaughlin, 8 A.R. 543.

The parties cannot waive a motion for a new trial and go direct to the Appellate Court: McColl v. Waddell, 19 C.P. 213; Côté v. Halliday, 17 C.L.T. 53.

The appeal given here would not apply to orders for committal under section 247: Rackham v. Blowers, 15 Jur. 758.

"Either party" has a right to appeal (in any case the subject of appeal) against the decision of a judge, on an application for a new trial; see section 156: Foster v. Green, 6 H. & N. 793.

A purely technical objection to a party's right of action, which had not been made in the court below, and could have been met by evidence, would not, it is submitted, be entertained in appeal: Bank of Bengal v. Fagan, 7 Moo. P.C. 61; Kay v. Marshall, 8 C. & F. 245; Midland Banking Co. v. Chambers, L.R. 4 Ch. at p. 400, *per* Selwyn, L.J.; Macdougall v. Knight, 14 App. Cas. 194; Proctor v. Parker, 12 Man. L.R. 528; R. v. Poirier, 19 C.L.T. 378; nor a point as to which it is not clear beyond doubt that the facts, if fully investigated, will support it: Connecticut Mutual Fire Ins. Co. v. Kavanagh, (1892) A.C. 473; Platt v. Waddell, 18 O.R. 539; Victoria Corporation v. Patterson, (1899) A.C. 615; but a substantial question, upon the construction of the document, or upon facts either admitted or proved beyond controversy, though not raised at the trial or on the motion for new trial, must be entertained on appeal: Gray v. Richford, 2 S.C.R. 431; but if the appeal is allowed on a point not raised below, the appellant may be disallowed costs: Garrett v. Roberts, 10 A.R. 650.

Where the evidence shows a total absence of foundation for the conclusion at which the judge has arrived, his decision will be reversed on appeal: British Industry L. Ass. Co. v. Ward, 17 C.B. 644; McLeod v. Chetwynd, 10 C.L.T. 345.

An order need not be formally drawn up on the application for a new trial before appealing: *Re* Jones, 4 P.R. 317.

An appeal would not, it is submitted, be entertained, not on the ground of the merits of the party's case, but upon a mere formal defect in procedure on the part of the opposite party: *Ex parte* Kennington, 8 Jur. N.S. 1111.

A question of practice would not be appealable: R. v. Stubbs, 1 Jur. N.S. 1115.

Should a judge be ready to deliver judgment, but formally delay it until a certain day in order to facilitate an appeal, judgment delivered

on the day to which postponement made would be the formal delivering of it: *Rathbone v. Munn*, 18 L.T. 856; *Re Burrowes*, 18 C.P. 493; *Re Smart and O'Reilly*, 7 P.R. 364.

The time counts from the day of delivering the judgment in open court, or if not in court from the day the parties are notified of it: *Fawkes v. Swayzie*, 21 O.R. 256.

A judge cannot by post-dating his judgment extend the time for appealing: *Wilberforce v. Sowton*, 39 L.T. 474; see *Brown v. Shaw*, 1 Ex. D. 425; *Hemming v. Blanton*, 42 L.J.C.P. 158; 21 W.R. 636; *Richardson v. Silvester*, 29 L.T. 395; *Barker v. Palmer*, 8 Q.B.D. 9.

Parties will be bound by the case made by the papers, certified by the clerk, and will not be allowed to travel out of it: *Watson v. Ambergate, Etc. Ry. Co.*, 15 Jur. 448; *Williams v. Evans*, L.R. 19 Eq. 547; *Rhodes v. Liverpool Com. Inv. Co.*, 4 C.P.D. p. 427, *per Coleridge, C.J.*; *R. v. City of London Court Judge*, 70 L.T. 595.

The respondent will be equally bound by what appears in the certified proceedings, even though not correct; but probably the court in appeal would, if any inaccuracy were shown to it, either refuse to hear the appeal: *Yorke v. Smith*, 21 L.J.Q.B. 53, or send it back for correction: *Thornwell v. Wigner*, L.R. 6 Ex. 87; where the "result of the evidence" only was returned to the Court of Appeal: see also *Sullivan v. Francis*, 18 A.R. 121; *Mahon v. Inkster*, 6 Man. L.R. 253.

The death of a respondent would not deprive the appellant of his right of appeal: *Hemming v. Williams*, L.R. 6 C.P. 480; but possibly the suit might have to be revived: *Rules 139 et seq.*

The High Court has jurisdiction to give leave to add the party so dying, and the application need not be made to the Division Court: *Blakeway v. Pattershall*, (1894) 1 Q.B. 247; see *Blair v. Asseltine*, 15 P.R. 211.

If a case is referred to arbitration there is no appeal: *Mayer v. Farmer*, 3 Ex. D. 235; nor would the consent of parties make any difference: *McColl v. Waddell*, 19 C.P. 213.

Where a judgment is obtained by fraud, appeal is not the remedy: *Flower v. Lloyd*, 6 Ch.D. 297; 10 Ch.D. 327.

Upon an appeal from the decision of a County Court in England, in an action for dilapidations, the case, without saying what the evidence given was, stated that the judge told the jury that it was not like an action for goods sold and delivered, and that the plaintiff might rest upon general evidence in support of his particulars of demand, without proving every item, especially as the jury had viewed the premises with the particulars in their hands, and therefore would be able to judge whether and to what extent the plaintiff had made out his case. The court directed a new trial: *Smith v. Douglas*, 16 C.B. 31.

The right of appeal is not lost because the judge omits to take down the evidence on the trial: *Sullivan v. Francis*, 18 A.R. 121; *Bank of Montreal v. Statten*, 1 C.L.T. 66; see *Seymour v. Coulson*, 5 Q.B.D. 359; *Wohlgemuthe v. Coste*, (1899) 1 Q.B. 501; and if the evidence in such a case cannot be agreed on or otherwise supplied, the Appellate Court may order a new trial: *Davidson v. Head*, Divl. Court, 9th April, 1898.

A judge is bound to do all that is legally required of him to facilitate an appeal: *Irving v. Askew*, L.R. 5 Q.B. 208, and probably an application to compel him to do so would be appealable: *Clarke v. Roche*, 36 L.T. 727; *Crush v. Turner*, 3 Ex. D. 303. Where a judge dies the new judge may proceed to complete the appeal: *McCallum v. Cookson*, 5 C.B.N.S. 498.

Although the Appellate Court has no jurisdiction to hear an appeal directly from the judgment at the trial that court, in quashing the appeal

for want of jurisdiction will give costs to the party, who raised the objection to jurisdiction: *Côté v. Halliday*, 17 C.L.T. 53. An appeal does not lie from an order of the judge dismissing an application for a new trial on a question or issue tried by the judge upon oral evidence in Division Court Chambers as to satisfaction of a judgment in the Division Court: *Johnston v. Galbraith*, 18 C.L.T. 58. It was also held in that case that the plaintiff could not on the appeal move in the alternative for prohibition as the latter motion must be made to a judge in chambers.

Where judgment was given against two defendants at the trial who did not press their defence, but the judgment was not formally entered against them until the final decision of the case as against a third defendant it was held that a motion for a new trial by the other defendants was too late and therefore they could not appeal: *Kinnard v. Tewsley*, 27 O.R. 398. Where plaintiff claimed \$100 and interest and defendant paid \$35 into court it was held that the sum in dispute was still in excess of \$100 exclusive of costs and that the appeal must be heard: *Petrie v. Machan*, 28 O.R. 504; affirmed on appeal, at p. 642.

As to *mandamus* on refusal to supply judge's notes: see *R. v. Sheffield Co. Ct. Judge*, 5 T.L.R. 303.

When there are notes of evidence taken by the judge in existence, they must be certified to the court: *Lumb v. Teal*, 22 Q.B.D. 675, at pp. 678, 680.

It was held that there was no appeal against a judgment entered by a County Court judge *pro forma* in order to expedite an appeal: *Chapman v. Withers*, W.N. (1887) 235.

No appeal will lie from an order of a judge directing the clerk to sign judgment which, without such order, he should have signed: *Barr v. Clark*, 8 C.L.T. 30; 5 Man. L.R. 130.

Consent to an Appeal.—It is somewhat difficult to believe that the legislature intended to give the right to appeal in all cases, no matter how little was involved; but there appears to be no escape from that conclusion on the wording of the section. When the parties consent to an appeal, the judge is bound to take down the evidence in writing: section 121 is made applicable to such cases: section 155, s-s. 2.

Quære.—Whether an appeal lies by consent in garnishee proceedings? The section does not declare that the consent need be in writing, and in the absence of such provision a written consent would be unnecessary: *R. v. Salop (Jus.)*, 4 B. & Ald. 626; *R. v. Surrey (Jus.)*, 5 B. & Ald. 539; *R. v. Huntingdonshire (Jus.)*, 19 L.J.M.C. 127; *R. v. Lincolnshire (Jus.)*, 3 B. & C. 548; *R. v. Nicol*, 40 U.C.R. 76; *Ex parte Butters, Re Harrison*, 14 Ch. D. 265; see also *Wycott v. Campbell*, 31 U.C.R. 584.

It would, however, be advisable in all cases that a formal written consent should accompany the papers to the Court of Appeal: see notes to section 91. For form of consent: see Form 190.

Appeal in Interpleader Proceedings.—The words of this section providing for an appeal in interpleader are very similar to those of the English County Courts Act, 1888, (51 & 52 V. c. 43, s. 120).

The proceedings in interpleader, being merely collateral, no right of appeal existed under the statute of 1880, which first gave an appeal: *Re Turner v. Imp. Bank of Canada*, 9 P.R. 19; *Bank of Montreal v. Statten*, 1 C.L.T. 66.

The bailiff should not return, but on the contrary should retain his execution in the original action until the disposal of the appeal: *Angell v. Baddeley*, 3 Ex. D. 49.

Money Claimed.—The appeal is given where the money claimed, or the value of the goods, or the proceeds thereof exceeds \$100; or where the damages claimed or awarded, under section 277, against either party or the bailiff exceed \$60. The value of the goods and the amount of damages cannot be added together so as to make an appealable case. The value of the goods may be \$100 and the damages \$60, and yet there will be no appeal: *White v. Milne*, W.N. (1887), 256; 58 L.T. 225; *Lumb v. Teal*, 22 Q.B.D. 675.

It is submitted that no appeal lies even by consent in interpleader proceedings, unless the requirements of the statute as to value or amount are complied with; such proceedings not being an action: see *Collis v. Lewis*, 20 Q.B.D. 20; *Coulson v. Spiers*, 9 P.R. 491; *Hamlyn v. Betteley*, 6 Q.B.D. 63.

"It is by no means clear that section 121 applies to interpleader;" *per Osler, J.A.*, *Sullivan v. Francis*, 18 A.R. 122; but see section 161, sub-section 2, which makes that section applicable to such proceedings.

The statute makes no provision for appraisal of goods seized on execution, as it does in attachment cases, under section 259, and the question is, who is to determine the value of the goods? Is it the bailiff who makes the seizure, or the judge who tries the interpleader issue, or the clerk? see Rule 35 (*g*). The "value" is not upon the goods that may be seized or otherwise taken by the bailiff, but only on those concerning which the interpleader proceedings are to be had.

Where among the papers returned was a list of goods bought by the claimant at an auction sale, it was assumed by the Appellate Court that the figures opposite to each article represented the price: *Sullivan v. Francis*, 18 A.R. 121.

Proceeds of Goods.—There can only be an interpleader in the Division Court for the proceeds of goods, where the claim is made to such proceeds, and if a claim is laid to the goods seized, there could not, without the consent of parties be an issue in respect of the proceeds of them: *Reid v. McDonald*, 26 C.P. 147.

It is submitted that the words "proceeds," as here used, would mean the gross amount received by the bailiff on sale of goods. Wharton defines the meaning of the word to be "the sum, amount or value of goods, etc., sold or converted into money." See *Jones v. Parell*, 11 Q.B.D. 430.

Money paid by the claimant under protest to obtain possession of his goods would be proceeds thereof within the meaning of the section: *Smith v. Critchfield*, 14 Q.B.D. 873.

It was doubted whether, in interpleader proceedings, an appeal would lie from a decision of a judge in the Division Court on the question of damages: *Fox v. Symington*, 13 A.R. 296; but this sub-section now makes provision for appeal in such cases.

Cross Appeal.—The respondent may, without any notice, ask for more than his judgment gives him by way of cross-appeal: *Hutson v. Valliers*, 19 A.R. 154. But see *Glines v. Cross*, 12 Man. L.R. 442. If the appellant may then abandon the appeal, he would, nevertheless, on the respondent proceeding with his cross-appeal, be entitled to urge his original contentions: *The Beeswing*, 10 P.D. 18; but see *Pickering v. Toronto Ry. Co.* 16 P.R. 144.

Security on Appeal.—Security on appeal to the Divisional Court is not to be required from the appellant, unless, upon an application showing special circumstances, the court otherwise orders: C.R. 827 (2); and an application under this rule is not sufficiently supported by showing that the appellant does not appear to be possessed of assets immediately

available under execution: *Confederation Life Assn. v. Labatt*, 19 C.L.T. 242; *Mc'ormick v. Temperance and General Life Ins. Co.*, 17 P.R. 175; *Arnold v. Van Tuyl*, 30 O.R. 663.

Consolidated Rules.—The following are the Consolidated Rules, as to appeals from the County Courts, which are made the basis of practice on appeals from the Division Court:

794. Subject to the next following Rule, any Judge of the County Court appealed from may, upon application to him, stay proceedings in the action to enable the appeal to be brought upon such terms and for such time as may seem just. Rule of 1 Jan., 1896, 1489 (836).

795. The appeals shall be set down to be heard at least 2 clear days before the first sittings of a Divisional Court, which commences after the expiration of 30 days from the decision complained of, and, where the motion or appeal is founded upon the evidence at or before the time of setting down, the appellant shall deliver to the proper officer 2 copies of the evidence certified as correct for the use of the Judges. Rules of 1 Jan., 1896, 1489 (837) *amended*.

796. The appellant shall, at least 7 days before the sittings at which the appeal is to be heard, serve the respondent with notice of hearing and the reasons of appeal. Rules of 1 Jan., 1896, 1489 (845) *amended*.

797. Where notice of hearing of the appeal has been given and the appeal has been set down to be heard, and notice thereof signed by one of the Registrars of the High Court has been given to the sheriff where execution is in his hands, the execution of the judgment or order appealed from shall be stayed pending the appeal, unless otherwise ordered by the Divisional Court or a Judge of the High Court, or by a Judge of the County Court appealed from; and the order may be on such terms as the Court or Judge applied to thinks fit. Rules of 1 Jan., 1896, 1489 (838) *amended*. (See 58 V. c. 13, s. 8.)

825. No security for costs shall be required on a motion or appeal to a Divisional Court. See 58 V. c. 12, s. 77; Rules 1 Jan., 1896, 1487 (803).

827.—(1) Unless otherwise ordered by the Court appealed to or a Judge thereof, the execution of the judgment or order appealed from shall, in the case of a motion or an appeal to a Divisional Court, upon the motion or appeal being set down for argument, and, in the case of an appeal to the Court of Appeal, upon the security in Rule 826 mentioned being allowed, be stayed pending the motion or appeal, except in the following cases:—

(a) If the judgment appealed from directs the assignment or delivery of documents or personal property, execution shall not be stayed until the things directed to be assigned or delivered have been brought into the Court appealed from, or placed in the custody of such officer or receiver as that Court or a Judge thereof appoints, or until security has been given to the satisfaction of that Court or Judge, and in such sum as may be directed, that the appellant will obey the order of the Court appealed to;

(b) If the judgment appealed from directs the execution of a conveyance or any other instrument execution shall not be stayed until the instrument has been executed and deposited with the proper officer of the Court appealed from, to abide the judgment of the Court appealed to;

(c) If the judgment appealed from directs the sale or delivery of possession of real property or chattels real, execution shall not be stayed until security has been given to the satisfaction of the Court appealed from, and in such sum as that Court or a Judge thereof directs, that during the possession of the property by the appellant he will not commit or suffer to be committed any waste on the property, and that if the

judgment be affirmed he will pay the value of the use and occupation of the property from the time of the appeal. *New.* See Con. Rule 804.

(d) If the judgment appealed from awards a mandamus or an injunction execution shall not be stayed except upon application to the Court appealed to or a Judge thereof, and upon such terms as may seem just. *New.*

(2) Upon special application, the Court appealed to or a Judge thereof may order that execution shall not be stayed, in whole or in part, except upon such terms as may seem just, including the giving of security for any sum directed by the judgment or order appealed from to be paid, either as a debt or for damages or costs, or for any less sum; or may order that execution be stayed, although security has not been given under Rule 826, and although the preceding provisions of this Rule have not been complied with, upon such terms as may seem just. *New.* See 58 V. c. 12, s. 77; Rules 1 Jan., 1896, 1496 (803).

Staying Proceedings.—Upon the appeal being set down the proceedings in this action are *ipso facto* stayed pending the appeal unless otherwise ordered by the court appealed to, C.R. 797, 827, *supra*. The appeal must be set down to be heard at the sittings of the Divisional Court which commences after the expiration of thirty days from the decision complained of: C.R. 795. The Divisional Court has no jurisdiction to extend the time for certifying the proceedings or for setting down the appeal: *McCarron v. Metropolitan Life Ins. Co.*, 35 C.L.J. 421; *Smith v. Hay*, 35 C.L.J. 421. Nor will the appeal be considered as set down until the papers are certified and filed, and if it should be placed upon the Divisional Court list improperly it will be quashed: *Ib.*; see also *Paul v. Rutledge*, 16 P.R. 140; *Gilmour v. McPhail*, 16 P.R. 151.

155. Where in any Division Court suit or proceeding, a decision is given which, in effect or in terms, renders invalid any general assessment made by a mutual insurance company, such decision shall be appealable, notwithstanding the sum in dispute upon the appeal is less than \$100, and all the provisions contained in sections 154 to 159, both inclusive, of this Act shall apply to such appeal. 60 V. c. 36, s. 138 (2).

Appeals affecting assessments made by mutual insurance company.

Mutual Insurance Appeals.—This provision merely enables the company to carry on a suit to an appeal as a test case. It frequently happens, however, that an assessment attacked as invalid by a large number of policy holders is held good by a Division Court judge, and there is no power to appeal therefrom unless the judgment against one of the defendants exceeds \$100. It would be useful to allow an appeal by leave where a number of actions involve the same question, so as to make the rights of parties equal.

156. Upon an application for a new trial in any cause wherein either party may appeal, each party shall leave with the Judge by whom the application is heard, a memorandum in writing of the name of some person resident within the county town of the county or united counties in which the cause was tried, with his place of abode, upon whom the notice of appeal, and all other papers thereafter requiring service, may be served for him, and service upon such person, or, in his absence, at his place of abode, shall be sufficient

Agent for service where right to appeal.

service thereof; and, in the event of failure to leave such memorandum by either party, all papers requiring service upon him may be served upon the Clerk of the Division Court, where the trial was had, or left at his office, for the person so failing to leave such memorandum, and such service shall be good service; the Clerk shall, in such case, forthwith mail, by registered letter, all such papers so served upon him to the person entitled to the same. R.S.O. 1887, c. 51, s. 150.

Notice of Appeal.—Notice of appeal is to be given to the respondent when the appeal is set down; see section 158.

Agent for Service.—Where either party fails to appoint an agent for service under this section, service of all papers may be made on the clerk of the court. The section requires the clerk to forward such papers by registered letter. Rule 173 requires prepayment of the postage and fees for transmission, to the clerk.

Certified
copies of
proceed-
ings, etc.,
to be
furnished
by clerk.

157. The Clerk of the Court in which the action or proceeding is pending, shall, at the request of the appellant, his counsel, solicitor or agent, furnish a duly certified copy of the summons with all notices indorsed thereon, the claim, and any notice or notices of defence, and of the evidence and all objections and exceptions thereto, and of all motions or orders made, granted, or refused therein, together with such notes of the Judge's charge as have been made, the judgment or decision when in writing, or the notes thereof, and all affidavits filed or used in the cause, together with all other papers filed in the cause affecting the questions raised by the appeal; the Clerk shall also furnish to the respondent, when required to do so, a duplicate copy of the proceedings so furnished to the appellant, or such portion thereof as may be required by him, and for every copy he shall be entitled to receive the sum of five cents per folio of one hundred words. R.S.O. 1887, c. 51, s. 151; 58 V. c. 13, s. 47 (3).

Certified Copies.—The papers here enumerated would include all of the papers in the suit. It is imperative on the clerk to furnish the copies of proceedings on payment of his fees. The request to the clerk need not be in writing, but had better be so, in order to prevent mistakes. For forms of certificate: see Form 213.

After the clerk has certified the copy of proceedings he could not alter nor add to the same: *Warner v. Riddiford*, 4 C.B.N.S. 180, unless sent back to him for that purpose: *London & N. W. Ry. Co. v. Grace*, 2 C.B. N.S. 555.

The judge's decision should be stated publicly and the reasons for it, before the certification of the papers and not sent afterwards to the Appellate Court: *Brown v. Gagy*, 2 Moo. P.C.N.S. 341; but the court will not refuse to receive a certificate of the judge if there are no notes of evidence: *Re Sullivan v. Francis*, 18 A.R. 121. The certificate should not be made *ex parte*, but should be settled in the presence of both parties: *Re Ryan v. Simonton*, 13 P.R. 299.

158. The appellant shall, within two weeks after the date of the decision complained of or within such other time as the Judge may by order in that behalf provide, file the said certified copy with the proper officer of the High Court and shall thereupon forthwith set down the cause for argument at the first sittings of a Divisional Court which commences after the expiration of one month from the decision complained of, and shall give notice thereof and of the appeal and of the grounds thereof, to the respondent, his solicitor or agent at least seven days before the commencement of such sittings; and the Divisional Court shall have power to dismiss the appeal or to give any judgment and make any order which ought to have been made, and shall give such order or direction to the Court below touching the decision or judgment to be given in the matter as the law requires, and shall also award costs in its discretion which costs shall be certified to and form part of the judgment of the Court below, and upon receipt of such order, direction and certificate, the Court below shall proceed in accordance therewith. 58 V. c. 13, s. 47 (4).

Procedure
upon
appeal from
Divisional
Court.

Within Two Weeks.—This means *fourteen* days. When a statute provided that notice of appeal was to be given "within one week" before such appeal was to be heard, and notice was given on the 22nd for the 29th it was held insufficient: *R. v. Sweeney*, 2 Ir. L.R. 278; see also notes to section 152. If the decision were given on the 1st the case might be set down on the 15th of the same month. And see *Paul v. Rutledge*, 16 P.R. 140; *Owen v. Sprung*, 28 O.R. 607. The Appellate Court has no jurisdiction to entertain an appeal unless the provisions of the statute are complied with: *Re South Ontario Election*, *Wheeler v. Gibb*, 3 S.C.R. 334; and when the junior judge refused to extend the time within which the copies should be filed the Divisional Court could not grant relief, even when the delay was caused by the clerk's neglect to furnish the certified copies in time: but an application might be made to the senior County Court judge: *Owen v. Sprung*, 28 O.R. 607; the County Court judge alone has power to extend the time: *Johnston v. The Town of Petrolia*, 17 P.R. 332; see also the *News Printing Co. v. Macrae*, 26 S.C.R. 695; *Kirby v. North British & Mercantile Ins. Co.*, (1896) 2 Q.B. 99, and cases cited in notes to section 161. It would seem that the County Court judge not only has power to extend the time but that this power may be exercised at any time in a proper case. The appeal must be entered before the day mentioned in the notice of it: *Donovan v. Brown*, 4 Ex. D. 148.

If any mistake should be made in copying the proceedings or setting down the appeal, there would appear to be no objection to an abandonment of the proceedings and taking them afresh, provided it could be done within the prescribed time or that the County Court judge extended the time for so doing: see *R. v. W. R. Yorkshire (Jus.)*, 3 T.R. 778; *Norton v. London & N.W. Ry. Co.*, 11 Ch. D. 118; *Owen v. Sprung*, 28 O.R. 607; and cases cited *supra*.

The Date of the Decision.—The time begins to run from the date of the decision, oral or written, pronounced or delivered. If the decision is not

pronounced in open court, it cannot be said to be pronounced or delivered until the parties are notified of it: *Fawkes v. Swayzie*, 31 O.R. 256.

Notice of Appeal.—Notice of setting down the appeal for argument and the grounds thereof must be served at least seven days before the commencement of the sittings at which the appeal is to be heard: C.R. 796. "At least seven days" means clear days, excluding both the day of service and the date of the commencement of the sittings: see notes to section 152.

Reasonable certainty only would be required in the notice, and it should not be criticised too closely or construed too strictly: *R. v. West Houghton*, 5 Q.B.D. 300 *per* Denman, C.J., at p. 302; *Re West Jewell Tin Mining Co.*, *Little's Case*, 8 Ch.D. 806.

It may be signed by the appellant's solicitor: *R. v. Middlesex*, (Jus.) 1 L.M. & P. 621, or in the appellant's name by the clerk to his solicitor, with the appellant's authority: *R. v. Kent*, (Jus.) L.R. 8 Q.B. 305.

In strictness, perhaps, it need not be signed at all: *R. v. Nichol*, 40 U.C.R. 76.

The "grounds" of appeal must be stated in the notice. A general statement that the judgment was erroneously made would perhaps be insufficient: *Torrence v. McPherson*, 11 U.C.R. 200.

It was held that where the notice stated that the appellant was not guilty of the offence it was a compliance with the Act, as it meant that all the ingredients of the offence were disputed: *R. v. Newcastle-upon-Tyne*, (Jus.) 1 B. & Ad. 933.

Any grounds of appeal could be set out in the notice in ordinary and concise language, and the appeal should be heard if it substantially informed the opposite party of the grounds intended to be relied on; see note to section 205.

It is submitted that the omission of the grounds of appeal should not prevent its being heard, such being for the information of the Appellate Court, and not a condition precedent to hearing the case: *Evans v. Matthews*, 26 L.J.Q.B. 166; *Grant v. The G.W. Ry. Co.*, 8 C.P. 348; *Smith v. Muirhead*, 13 U.C.R. 9; *Ex parte Bromley*, *Re Redfearn*, 12 L.T. 783; *Richardson v. Silvester*, 29 L.T. 395.

If one of the grounds of appeal is misdirection or non-direction of the jury, the notice should state how and in what manner the judge misdirected or failed to direct the jury: *Furlong v. Reid*, 12 P.R. 201; *Pfeiffer v. Midland Ry. Co.*, 18 Q.B.D. 243.

For form of notice, see Form 303.

Where there is a fatal objection to the right of appeal, the respondent should apply to quash the appeal, and not wait until the hearing to urge such objection to its competency; otherwise he will be allowed only the costs of a motion to quash: see R.S.O. c. 51 s. 51; *Tronson v. Dent*, 8 Moo. P.C. 420; *O'Sullivan v. Lake*, 16 S.C.R. 636.

If a party appeals from a judgment in his favor claiming relief inconsistent with that granted by the judgment appealed from, and, pending the appeal, proceeds upon the judgment and attains the relief granted thereby, his appeal will, on motion, be quashed: *International Wrecking Co. v. Lobb*, 12 P.R. 207. A party cannot accept the benefit of an order and then endeavor, by an appeal, to reject a burdensome provision: *Pearce v. Chaplin*, 9 Q.B. 802.

Judgment in Appeal.—The Divisional Court cannot give any other judgment than that which ought to have been given in the court below.

Where a case has been tried by a jury, if there is any evidence by which the verdict can reasonably be supported, the court cannot, it is

submitted, do anything but grant a new trial, and cannot give a final judgment for the appellant: *Jonas v. Adams*, 20 L.J.Q.B. 397; *Connecticut Life Ins. Co. v. Moore*, 6 App. Cas. 644; *Toulmin v. Millar*, 12 App. Cas. 746; see notes to section 120 *ante*, p. 208, and notes to section 152, *ante* p. 289.

Where judgment has been given for the plaintiff, the court has, it is submitted, power to order a nonsuit: see section 120; *Fuller v. Cleveley*, 17 Jur. 736; Rule 275.

Where an appeal was dismissed because no counsel appeared, the court allowed the case to be restored to the paper the following term on an affidavit that the appellant's counsel had been prevented from attending by dangerous illness in his family: *McAllister v. Cushing*, 8 C.L.T. 447; 26 N.B.R. 62.

A case once decided on appeal would not, it is submitted, be reconsidered: *Thellusson v. Rerdlesham*, 7 H.L. Cas. 429.

Enforcing the Judgment.—The judgment of the Divisional Court or an office copy thereof may be deposited by either party with the clerk of the Division Court, and upon being so deposited the judgment must be filed, and may be enforced as if it had been made by such Division Court: Rule 302. The section provides that the Division Court shall proceed in accordance with the order, direction, and certificate of the Divisional Court. It is evidently intended that the formal order of the Divisional Court or a certified copy thereof is the "judgment" to be deposited.

If the order of the Divisional Court be that judgment shall be entered for either party, then the judgment shall be entered accordingly, and the successful party shall be at liberty to proceed on such judgment as on a judgment of the Division Court: Rule 304. The clerk should make the necessary entry in the procedure book on the deposit of the order, and the judgment will then be of the same force and effect as if originally given in the Division Court.

New Trial After Appeal.—If a new trial is ordered on appeal it shall be entered for trial at the next sittings of the Division Court which shall be holden next after twelve clear days from the time of depositing the judgment or order of the Divisional Court with the clerk, unless the parties agree that it shall be tried sooner or the judge otherwise order, and it shall be conducted in the same manner as any new trial granted by the Division Court: Rule 303. The day of depositing the order and the day of the trial are excluded in computing the twelve days. If the parties agree to the trial being held before the time prescribed, an agreement to that effect in writing would be preferable, though not strictly necessary. If the appellant should delay the deposit of the order within a reasonable time the opposite party could do so; and if less than the prescribed time should elapse between the deposit and the next sittings of the court the judge would have good ground for ordering the trial to be proceeded with at that court.

Costs.—Should the court omit to provide for costs when giving judgment, it might afterwards do so, even though the order should have been issued: *Harly v. Pickard*, 12 P.R. 428; *Fritz v. Hobson*, 14 Ch.D. 542; C.R. 640; but see *Taylor v. Great Northern Ry. Co.*, L.R. 1 C.P. 430. When the appeal is struck out on the ground that there is no jurisdiction to hear it, the Divisional Court may award costs: *Coté v. Halliday*, 17 C.L.T. 53; *Sato v. Hubbard*, 6 A.R. 546; *Teskey v. Neil*, 15 P.R. 546; *Crowther v. Boulton*, 13 Q.B.D. 680; *Diss Urban Sanitary Authority v. Aldrich*, 2 Q.B.D. 179. Should the appeal be abandoned the costs would be payable by the party abandoning it: see C.R. 790; *Charlton v. Charlton*, 16 Ch. D. 273.

If the respondent appears and the appellant does not, the appeal will probably be dismissed with costs; *Sherburne v. Middleton*, 9 Cl. & F. 72; *Seanlan v. Usher*, 8 Cl. & F. 561; *Smith v. Durant*, 9 H. L. Cas. 192; *Berry v. Exchange Trading Co.*, 1 Q.B.D. 77; and it is submitted that in the absence of the appellant's counsel, the counsel for the respondent would not be called upon to sustain the judgment of the court below: *Gardiner v. Simmons*, 1 Cl. & F. 35; see also notes to section 159.

Taxable
costs on
appeal.

159. The costs taxable as between party and party upon or connected with any appeal shall be the actual disbursements and no greater amount over and above actual disbursements than \$15, inclusive of counsel fee; the costs of such appeal as between solicitor and client, shall be taxable on the County Court scale. R.S.O. 1887, c. 51, s. 153; 58 V. c. 13, s. 47, (5).

Costs of Appeal.—Costs are usually allowed to the successful party, unless there is something exceptional in the circumstances: *Eddy v. Ottawa City P. Ry. Co.*, 31 U.C.R. 576; *Re Shaver v. Hart*, 31 U.C.R. 609; *Herbert v. Park*, 25 C.P. 57; *Wambold v. Foote*, 2 A.R. 579; *Winger v. Sibbald*, 2 A.R. 611; *Connybeare v. Farries*, L.R. 5 Ex. 16; *Ashby v. Sedgwick*, L.R. 15 Eq. 245; *Booth v. Turle*, L.R. 16 Eq. 182; and the fact that the judge below had *ex mero motu* made an erroneous adjudication, is not a ground for departing from the rule: *Mills v. Hamilton St. Ry. Co.* 17 P.R. 74.

But where the point is not raised in the court below, costs may be disallowed: *Kelly v. Ottawa St. Ry. Co.* 3 A.R. 616, 627; *Garrett v. Roberts*, 10 A.R. 650; *Cooper v. Cooper*, 13 App. Cas. 88; *Dreschel v. Auer Incandescent Light Mfg. Co.*, 28 S.C.R. 268; *Tollemache v. Hobson*, 5 B.C.R. 223.

The costs are "to be certified and to form part of the judgment of the court below."

The costs of appeal could not be recovered by process of the High Court: see *Philipps v. Philipps*, 5 Q.B.D. 60; *McArthur v. Southwold*, 8 P.R. 27.

As between parties to the suit, only \$15 and the "actual disbursements" are taxable to the successful party, yet as between solicitor and client the County Court tariff is adopted.

JURIES.

When a
jury may be
required.

160. Either party may require a jury in tort or replevin where the sum or the value of the goods sought to be recovered exceeds \$20, and in all other cases where the amount sought to be recovered exceeds \$30. R.S.O. 1887, c. 51, s. 154.

Either Party may Require a Jury.—The right to have a jury summoned under this section depends upon whether the suit is one for damages exceeding \$20, in tort or replevin, and upwards of \$30 in all other actions, and also upon the giving of notice and the payment of the proper fees as required by section 162. The nature of the action is to be determined by the particulars of claim, having regard to section 98, and where from such particulars it appears that the action is in tort, and the amount claimed exceeded \$20, either party is entitled to a jury: *Re London Mut.*

F. Ins. Co. v. McFarlane, 26 O.R. 15. If these requirements are complied with, and a jury has been properly demanded, the judge cannot properly try the case without a jury: *Hamlyn v. Betteley*, 6 Q.B.D. 63; *Bank of B.N.A. v. Eddy*, 9 P.R. 468; *Metcalf v. Birtle*, 34 Sol. Jour. 284.

Formerly unless he nonsuited the plaintiff the judge could not withdraw the case or any part of it from the jury: *Re Lewis v. Old*, 17 O.R. 610; or submit questions to the jury and enter a judgment upon their answers to such questions: *Re Jones v. Julian*, 28 O.R. 60. But under 62 Vic. c. 11, s. 9 (section 175 *a*, *infra*) the judge has power to determine whether there is in law any question to be submitted to the jury for them to pass upon and if in his opinion there is not he may direct a nonsuit or dismiss the action. And he may also direct the jury to answer any questions of fact, stated to them by him for the purpose, and enter such judgment thereon as in his opinion may be proper. He is also empowered to determine the law and direct the jury thereon.

He cannot refuse to allow a jury to be sworn and determine the facts of the case himself: *Re Cowan v. Affie*, 24 O.R. 358.

The withdrawal of a juror is not a determination of the case, except in this sense of the word, that unless something very special happens the court will hold the parties to their understanding and will stay any further proceedings in the action: *Thomas v. Exeter Flying Post Co.*, 18 Q.B.D. 822; and it is doubtful if the withdrawal of a juror has any effect in a Division Court case; *Norburn v. Hilliam*, L.R. 5 C.P. 129.

Nonsuit.—As to power to nonsuit, see notes to section 151.

Inspection of Property by Jury.—The judge by whom any action or matter may be tried, may inspect, or order the jury to inspect, any property or thing concerning which any question may arise in the action: Rule 279.

Garnishes Proceedings.—The right to a jury is extended, by 62 Vic. c. 11, s. 10, to claims to be adjudicated upon under section 202, where the amount claimed exceeds \$30. See section 202 (2), and notes thereto.

161.—(1) Either party to an interpleader issue in a Division Court may require a jury to be summoned to try the issue and in such cases he shall, within five days after the day of service of the summons on him, give to the clerk or leave at his office notice in writing, requiring a jury, and shall at the same time deposit with the Clerk towards the costs in the cause, the proper fees for the expenses attending the summoning of the jury, and thereupon a jury shall be summoned according to the provisions of this Act. R.S.O. 1887, c. 51, s. 155 (1); 57 V. c. 23, s. 5.

Right to
jury in
inter-
pleader.

(2) Sections 121, 122 and 214 shall extend and apply to all interpleader issues and other actions mentioned in subsection 2 of section 154. R.S.O. 1887, c. 51, s. 155 (2).

Interpleader Issue.—As to parties to an interpleader issue, see section 277 and notes thereto. The provisions of section 174 as to a judge's jury are also made applicable to interpleader proceedings.

To Try the Issue.—As to the right to a jury, see section 160 and note thereto.

Formerly a jury was not allowed in interpleader cases: see *Munsie v. McKinley*, 15 C.P. 50.

The issue in interpleader cases when the execution creditor is plaintiff, is whether the goods were, at the time of the seizure, exigible under his execution: *Duncan v. Tees*, 11 P.R. 296; *Van Every v. Ross*, 11 C.P. 133; and other cases cited in notes to section 277: if the claimant is in possession at the time of the seizure the onus is upon the execution creditor to show that the goods were the property of the debtor: *Winfield v. Fowle*, 14 O.R. 102; *Dominion S. & I. Co. v. Kilroy*, 7 C.L.T. 87; *Doran v. Toronto Suspender Co.*, 14 P.R. 103; Rule 32 (a). See further, notes to section 277.

Though the debtor may be estopped from claiming the goods as against the claimant, the execution creditor may show that the claimant has no valid title: *Richards v. Jenkins*, 18 Q.B.D. 451: see notes to section 277.

Within Five Days.—See notes to sections 113 and 151. The judge could not extend the time: *Brown v. Shaw*, 1 Ex. D. 425; *Tenant v. Rawlings*, 4 C.P.D. 133; *Whistler v. Hancock*, 3 Q.B.D. 83; *Re Prescott Election Case*, 9 P.R. 481; *Barker v. Palmer*, 8 Q.B.D. 9; *Re McLean v. Osgoode*, 30 O.R. 430; see also cases cited in notes to section 152, *ante* p. 285.

In ordinary actions a plaintiff must give notice when entering his claim, and the defendant within five days after the day of service, but under this section there is no distinction as to time in respect of plaintiff or defendant.

Notice in Writing.—The notice is a condition of the right to have a jury summoned. A verbal notice would not be sufficient: see *Fletcher v. Baker*, L.R. 9 Q.B. 370; *Re McGregor v. Norton*, 13 P.R. 223. If a jury be not properly summoned, a judge should not try the case with a jury against the protest of counsel for the opposing party: see *Hamlyn v. Betteley*, 6 Q.B.D. 63, unless the jurors were called under section 174. But if both parties appeared at the trial and neither objected to the summoning or empanelling of the jury, that would amount to a waiver of any irregularity or omission in respect of the notice: *Ex parte Morgan*, *Re Simpson*, 2 Ch. D. 72.

Prepayment of Fees.—As to the fees to be paid to the jurors, see section 178. The clerk is not bound to accept the notice for jury, nor to act on it without prepayment of the expenses of the jury. He should not exact more than should be reasonably required for the purpose of having a jury summoned, but he is entitled to prepayment not only of his own fees in connection with the work, but to those of the bailiff as well. The expenses attending the summoning of a jury are now costs in the cause: See also section 162.

A Jury Shall be Summoned.—This is imperative. Either party by complying with the terms of the statute has a right to have a jury summoned and his case tried by a jury, and the judge cannot deprive him of the right: see note to section 160; see also *Sugg v. Silber*, 1 Q.B.D. 362; *Clarke v. Cookson*, 2 Ch. D. 746; *Ford v. Taylor*, 3 C.P.D. 21; *Clarke v. Skipper*, 21 Ch. D. 134; *Re Lewis v. Old*, 17 O.R. at p. 613; *Re Cowan v. Affie*, 24 O.R. 358; unless after hearing the whole evidence, or the evidence adduced by or on behalf of the plaintiff alone, the judge should determine that there is in law no evidence to be submitted to the jury for them to pass upon, in which case he may direct a nonsuit or dismiss the action.

The Provisions of This Act.—The provisions of the Act with respect to (1) the order in which cases are to be tried (section 121); (2) consenting not to appeal (section 122); (3) counsel fees (section 214); are here made applicable to interpleader cases and to causes in which the parties consent to an appeal: section 174 is also applicable to an interpleader issue.

For form of pay list of jurors see Form 222.

162. In case the plaintiff requires a jury to be summoned to try the action, he shall give notice thereof in writing to the Clerk one week before the sitting of the Court at which the case is to be tried, and shall at the same time deposit with the Clerk towards the costs in the cause the proper fees for the expenses attending the summoning of the jury; and in case the defendant requires a jury, he shall, within five days after the day of service of the summons on him, give to the Clerk or leave at his office the like notice in writing, and shall at the same time deposit with the Clerk the proper fees as aforesaid; and thereupon, in either of such cases, a jury shall be summoned according to the provisions hereinafter contained. Provided however that in any case transferred from one Division Court to another under section 91 of this Act, either plaintiff or defendant may require a jury to be summoned by giving to the Clerk of the Court to which such case has been transferred, or leaving at his office three clear days before the sittings of the Court at which the case is to be tried, a notice requiring a jury to be summoned, and by depositing with the Clerk toward the costs in the cause, the proper fees for the expenses of summoning the jury. R.S.O. 1887, c. 51, s. 156; 57 V. c. 23, s. 6; 60 V. c. 14, s. 8.

Parties to give notice to clerk if they require a jury.

Proviso.

Notice Thereof.—See notes to sections 160 and 161. The plaintiff must demand the jury at the time of entering the claim. The notice is a condition precedent to the right to have a jury, and must be given at the time and in the manner prescribed: see notes to last section.

Towards Costs in the Cause.—In *Lewis v. Old*, 17 O.R. 615, it was said that the fees paid for the expenses of a jury were not taxable against the opposite party. This provision was introduced by 57 Vic. c. 23, s. 6, apparently with the intention of settling the doubt raised by that case regarding the matter, and of making the expenses attending the summoning of a jury costs in the cause, and recoverable by the successful party. As to the expenses attending a jury when ordered by the judge on a motion for a new trial: see notes to section 152, *ante* p. 290.

Within Five Days.—See notes to section 161.

Transferred Cases.—In cases which have been entered in the wrong division and have been transferred by the judge to the division in which they ought to have been entered originally, the time for filing a notice requiring a jury, is decreased to 3 days before the sitting of the court. The jurors must be summoned at least three days before the sittings: Section 166.

163. Unless exempted by *The Jurors' Act*, every person whose name appears on the last published voters' list of any municipality, partly or wholly situate within the limits of any Division Court, and who resides within the Division, and whose name is marked 'J,' as provided in section 23 of the

Who may be Jurors, Rev. Stat. c. 61.

said Act shall be liable to serve as a juror for the Division Court in such Division. 52 V. c. 12, s. 17.

Jurors.—This section makes provision for jurors in Division Courts and, therefore, the general Act, R.S.O. c. 61, respecting jurors and juries does not apply.

Unless Exempted By The Jurors' Act.—The persons exempted by *The Jurors' Act* are enumerated in sections 6 to 11 of that Act, R.S.O. c. 61.

Resident Within the Division.—See notes to section 84.

Section 23 of That Act.—The following is the section of *The Jurors' Act* referred to:—

"23. In order to facilitate the selection of jurors, the clerk shall, in making out the voters' list in the column containing the number of the voter on the roll, or in a separate column provided for the purpose beside the same, write or mark the letter "J" upon the voters' list opposite the name of every male person over twenty-one and under sixty years of age who, by the roll, appears to possess the property qualification requisite to qualify him to serve as a juror; and such voters' list shall show, at or near the end thereof, the aggregate number of names of persons upon such list qualified to serve on juries, and in the case of cities and towns the said list shall give the same information for each ward, and it shall not be necessary for the selectors to refer to any name on the assessment roll which has not the letter "J" opposite it on the voters' list, unless the selectors suspect that some names are not properly marked."

Jurors,
how
selected
and
summoned.

164.—(1) The jurors to be summoned to serve at any Division Court shall be residents of the division, and shall be taken from the last published voters' lists of the municipalities, partly or wholly within the division, and shall be summoned in rotation, beginning with the first of such persons in such voters' lists who resides within the division, and whose name is marked 'J,' as provided in the preceding section, and if there be more than one municipality partly or wholly in the division, beginning with the voters' list for the municipality within which the Court is held, and then proceeding to that one of the other voters' lists which contains the greatest number of such persons' names, and so on until all the lists have been gone through, after which they may be gone through again in the same order.

(2) If at any time it shall appear to the County Judge that the cost of summoning a jury is excessive, by reason of the residences of the persons liable to be selected in ordinary course being in a distant portion of the division, the County Judge may order the Clerk of the Division Court to commence at the first name marked 'J,' as before provided upon the voters' list of any municipality partly or wholly within the division. 52 V. c. 12, s. 18.

Summoning Jurors.—Under this section the clerk of the Division Court, in summoning jurors, must go through all the names which are on the voters' list of the municipality or municipalities within the division in rotation, beginning with the list of voters for the municipality within which the court is held, and when that is exhausted proceeding to that one of the other voters' list which contains the greater number of such persons' names; and so on until all the lists have been gone through.

The judge is empowered, however, when a distant municipality is reached, in order to save expense, to order that the clerk shall take the list for a nearer municipality.

The improper selection of a jury can be taken advantage of by either party at the trial. In such cases it would be the duty of the judge, if he found any irregularity in that respect to exist, to postpone the trial of the cause so that a jury might be properly summoned, if both parties would not consent to his trying it without a jury. The irregularity being that of an officer of the court, neither party would be allowed to be prejudiced by it. *Actus curiæ neminem gravabit.*

Summons to be Issued and Served.—The clerk is required to issue a summons and also twelve copies thereof for service on the jurors, and to deliver them to the bailiff for service. Upon the return of the original summons the clerk shall prepare an affidavit of service and of the mileage necessarily incurred to effect such service, which affidavit shall be sworn by the bailiff: Rule 156, section 166, and notes thereto.

The service need not necessarily be personal: section 166. The summons may either be served personally on the juror: see notes to section 163; or left with a grown-up person at the residence of the juror: see notes to sections 84, 113 and 116.

For form of summons see Form No. 57.

165. The Clerk of every municipality shall furnish each Division Court Clerk within whose division the said municipality is partly or wholly situate, with a correct copy of the voters' list of the said municipality immediately after the publication of the same in each year; and after a new voters' list is furnished to him the Division Court Clerk shall take the names of jurors therefrom, beginning as nearly as may be at the part of the list corresponding to the place where he left off in the previous list. 52 V. c. 12, s. 19.

Clerk of municipality to furnish Division Court Clerk with copy of voters' list.

The Clerk of Every Municipality.—Provision is made by section 169 for the punishment of the clerk of the municipality for breach of his duty under this section. It is submitted that he would be subject to no other liability: *Finlay v. Miscampbell*, 20 O.R. 29; *Cowley v. Local Board*, (1892) A. C. 345, *Tompkins v. Brockville Rink Co.*, 31 O.R. 124. As to power of local legislatures to punish, see *R. v. Wason*, 17 A.R. 232; *R. v. Bittle*, 21 O.R. 605.

If no punishment had been provided the clerk might have been indictable: see *Roscoe's Crim. Ev.* 9th ed. 783; *Criminal Code*, 1892, s. 138.

166. For the trial of actions required to be tried by or before a jury at any session of a Division Court the Clerk of the Court shall cause not less than twelve of the persons liable to serve as jurors to be summoned to attend at such

Summoning jurors.

session at the time and place to be mentioned in the summons, and the summons shall be served at least three days before the Court, either personally, or by leaving the same with a grown up person at the residence of the juror, and the Clerk shall issue a summons and also twelve copies thereof for service on the said jurors, which summons shall be returned to the Clerk with the service thereof duly verified by the oath of the Bailiff serving the same. R.S.O. 1887, c. 51, s. 160; 52 V. c. 12, s. 20.

Required to be Tried By or Before a Jury.—See notes to sections 160 and 161.

At Least Three Days.—See notes to sections 113 and 158.

At the Residence of the Juror.—As to service of summons, see notes to section 164 and Rule 156.

Verified by the Oath of the Bailiff.—The bailiff is required to make an affidavit of service and of the mileage necessarily incurred: Rule 156; notes to section 164. See notes to section 109 as to computation of mileage and affidavit of service.

Parties
entitled to
challenge

167. Either the parties to the cause shall be entitled to his lawful challenge against any of the jurors in like manner as in other courts. R.S.O. 1887, c. 51, s. 161.

The Right of Challenge.—The Jurors Act declares the right of peremptory challenge to "any four" of the jurors drawn to serve on the trial of the cause: R.S.O. c. 61, s. 111.

The right of challenge is a common law right, and cannot be taken away except by express enactment: *Barrett v. Long*, 3 H.L. Cases 395. If alienage is relied on as a ground of challenge, the party who has an opportunity of making it, and neglects it, cannot afterwards make the objection: *R. v. Sutton*, 8 B. & C. 417. A juryman should not have an interest in the result of the suit: *Bailey v. Macaulay*, 13 Q.B. 815. But where a public company was a party to an action, the mere fact that one of the jurymen was a shareholder in the company was held no ground for granting a new trial: *Williams v. The G.W.R. Co.*, 3 H. & N. 869; see also *Richardson v. Canada West Farmers' Ins. Co.*, 17 C.P. 341. A juror cannot be challenged because in a previous case he had shown some dissatisfaction with the law as laid down by the judge in favor of the party challenging: *Pearse v. Rogers*, 2 F. & F. 137. Want of qualification (except in respect of property) is a good ground of challenge: c. 61, s. 110. Because a juror affirms, affords no ground of challenge: sec. 111. "If a juror be challenged for *cause* before any juror *sworn*, two triers are appointed by the court; and if he be found indifferent and sworn, he and the two triers shall try the next challenges; and if he be tried and found indifferent, then the first two triers shall be discharged, and the two first jurors tried and found indifferent shall try the rest;" *Roscoe's Crim. Ev.*, 8th ed., 210; *R. v. Smith*, 38 U.C.R. 218. The challenge of a juror must be before the oath is commenced. The moment the oath is begun it is too late. *The oath is begun by the juror taking the book*, having been directed by the officer of the court to do so; but if the juror takes the book without authority, neither party willing to challenge is to be prejudiced thereby: *R. v. Frost*, 9 C. & P. 129. Upon a challenge for cause, the person making the challenge must be prepared to prove the cause: *R. v. Savage*, 1 Moo. C.C. 51.

168. Any juryman who, after being duly summoned for that purpose, wilfully neglects or refuses to attend the court, in obedience to the summons, shall be liable to a fine in the discretion of the Judge, not exceeding \$4, which fine shall be levied and collected with costs, by the same process as any debt or judgment recovered in the said Court, and shall form part of the Consolidated Revenue Fund. R.S.O. 1887, c. 51, s. 162.

Penalty on jurors disobeying summons.

Not Exceeding \$4.—No other punishment, than that prescribed by the section, could be imposed. R. v. Lefroy, L.R. 8 Q.B. 134; R. v. Jordan, 36 W.R. 589, 797; R. v. Judge Brompton, C.C. (1893) 2 Q.B. 195.

It is submitted that the word "wilfully" here means of his own free will, viz., that he knew he had been summoned and, being a free agent, did not attend: *Re Young v. Harston*, 31 Ch. D. 174; *Smith v. Barnham*, 1 Ex. D. 419; *Miles v. Roe*, 10 P.R. 218; *Wilson v. Manes*, 26 A.R. 398; but see *Johnson v. Allen*, 26 O.R. 550. Neglect or refusal to attend is a contempt of court for which the statute provides a remedy: see *Ex parte Lees* and *The C.C. Judge of Carleton*, 24 C.P. 214. If not summoned three days "at least," the juror would not be in default: *Wagner v. Mason*, 6 P.R. 187.

169. If any Clerk of a municipality, for six days after demand in writing, neglects or refuses to furnish the Clerk of a Division Court, within the limits of which the municipality for which he is Clerk, is partly or wholly situate, with a correct copy of the voters' list as provided in section 165 of this Act, the Clerk of the Division Court may issue a summons to be personally served on the said Clerk of the municipality, three days at least before the sitting of the Court, requiring him to appear at the then next sitting of the Court, to show cause why he refused or neglected to comply with the provisions of the said section. 52 V. c. 12, s. 21.

Proceedings against clerk of municipality for refusing to furnish copy of voters' list.

For Six Days.—This is exclusive of the day on which the demand is made: *Young v. Higgon*, 6 M. & W. 49; *Barrowman v. Fader*, 31 N.S.R. 29; and notes to section 131 *ante*.

Neglects or Refuses.—It will be observed that the word "wilfully" is here omitted.

To "neglect" doing, is the omission to do some duty which the party is able to do: *per Patteson, J.*, *King v. Burrell*, 12 A. & E. 468. When "negligently" is part of an offence it implies that the act constituting the offence shall have been done or caused by the alleged offender himself: proof that it was done by his servant, without more, will not bring the charge home: *Chisholm v. Doulton*, 58 L.J.M.C. 133. "Negligence is the omitting to do something which a reasonable man would do, or the doing of something which a reasonable man would not do:" *per Alderson, B.*, *Blyth v. Birmingham W.W. Co.*, 11 Ex. 781.

As to words "neglect or refusal" and "negligence or omission" in a statute, see *Vogel v. The G.T. Ry. Co.*, 10 A.R. 162.

Three Days at Least.—See notes to sections 113 and 158.

Personally Served.—See notes to section 103.

For form of summons, see Form 272.

Judge may
fine muni-
cipal clerk
for breach
of duty.

170. Upon proof of the service of the summons, the Judge may, in a summary manner, inquire into the neglect or refusal, or may give further time, and may impose such fine upon the Clerk of the municipality, not exceeding \$20, as he deems just, and may also make such order for the payment by the Clerk of the municipality of the costs of the proceedings as to the said Judge seems meet; and all orders made by the Judge for the payment of a fine or costs shall be enforced against the Clerk of the municipality by such means as are provided for enforcing judgments in the Division Courts. R.S.O. 1887, c. 51, s. 165; 52 V. c. 12, s. 22.

Upon Proof.—See notes to sections 103, 116.

By Such Means.—See notes to section 218.

Judge's list
and jury
list.

171. The causes to be heard by the Judge alone shall be set down for hearing in a separate list from the list of causes to be tried by a jury, which two lists shall be severally called "The Judge's List," and "The Jury List," and the causes shall be set down in the lists in the order in which they were in in the first instance entered with the Clerk:—"The Jury List" shall be first disposed of, and then "The Judge's List;" except where the Judge sees sufficient cause for proceeding differently. R.S.O. 1887, c. 51, s. 166.

Heard by the Judge Alone.—The policy of the law in regard to Division Court causes is that the judge himself should dispose of the case unless a jury has been summoned: see notes to sections 120 and 174. The convenience of jurors was evidently considered in framing this section; the object clearly was to free them from duty as soon as the business would permit.

The Trial Lists.—The clerk is required to prepare three lists. A "Jury List," in which he shall enter all cases to be tried by a jury; a "Judge's List," in which he shall enter all cases to be tried by a judge alone; and a "Judgment Debtors' List," in which he shall enter all cases in which the judgment debtor has been summoned for examination under section 243: Rule 155. As to arrangement of lists and the order in which actions are to be tried see Rule 155, and section 121, *ante* p. 211.

Five jurors
to be em-
pannelled,
etc.

Verdict to
be
unanimous.

172. Five jurors shall be empannelled and sworn to do justice between the parties whose cause they are required to try, according to the best of their skill and ability, and to give a true verdict according to the evidence, and the verdict of every jury shall be unanimous. R.S.O. 1887, c. 51, s. 167, part.

Five Jurors Shall be Empannelled and Sworn.—See notes to sections 160, 161, 164 and 175 *a*. Five jurors only shall be empannelled and sworn in a Division Court case. The oath is that they shall do justice between the parties whose cause they are required to try, according to the best of their skill and ability and to give a true verdict according to the evidence.

For forms of oath to jurors see Form 41.

173. In the event of the panel being exhausted before a jury is obtained, the Judge may direct the Clerk to summon from the body of the court a sufficient number of disinterested persons to make up a full jury, and any person so summoned may, saving all lawful exceptions and rights of challenge sit and act as a juror as fully as though he had been regularly summoned. R.S.O. 1887, c. 51, s. 167, part.

Judge may
call *tales*.

Summon from the Body of the Court.—Provision is here made for a *tales*. The same rights to the parties would exist in regard to the jurors summoned under the section as to those regularly summoned.

The fees payable to jurors summoned under this section would be the same as those to be paid to jurors regularly summoned under section 166. Section 178 provides that there shall be paid to "every person who has been summoned as a juror, and who attends during the sittings of the court for which he has been summoned, and who does not attend as a witness in any cause, or as a litigant in his own behalf, the sum of \$1." No distinction appears to be made between the jurors regularly summoned and those summoned in court. But in the case of a jury called by the direction of the judge, under section 174, the persons called upon to serve as jurors are placed in an anomalous position, being entitled to receive only *ten cents*.

174. In case the Judge before whom an action is brought thinks it proper to have any fact controverted in the cause tried by a jury, the Clerk shall instantly return a jury of five persons present to try such fact, and the Judge may give judgment on the verdict of the jury, or may grant a new trial on the application of either party, in the same way and under similar circumstances as new trials are granted in other cases on verdicts of juries. Each juror so called and sworn shall be paid the sum of ten cents, and the moneys so paid shall be taxed as costs in the cause. This section shall extend and apply to the trial of an interpleader issue. R.S.O. 1887, c. 51, s. 168; 57 V. c. 23, s. 7.

Judge may
order jury
to be em-
panelled to
try any
disputed
fact.

Any Fact.—The parties are entitled to the decision of the judge but the judge may submit any contested fact to a jury, and would be bound to give judgment in accordance with the fact so found. The whole case should not be left to a jury called under this section, but merely the contested fact or facts.

Tried by a Jury.—It is frequently the case that judges find, to use the words of the late Lord Bramwell, that some facts can be better settled by, "that true Court of Equity, a jury, which, disregarding men's bargain and the law, will decide *what is right* in spite of all you can say to them," than by themselves: 5 L.J. 293.

May Give Judgment.—No doubt the word "may" when used in an Act of the Legislature of Ontario, by the Interpretation Act, and on general principles of statutory construction, is permissive, but, it is submitted, that construction cannot apply in such a case as this.

"When a statute confers an authority to do a judicial or indeed any other act which the public interest, or even individual right may demand,

it is imperative on those so authorized, to exercise the authority when the case arises, and its exercise is duly applied for by a party interested, and having a right to make the application. In giving one person the authority to do the act, the statute impliedly gives to others the right of requiring that it shall be done: the power being given for the benefit, not of him who is invested with it, but of those for whom it is to be exercised. The Legislature, in such cases, imposes a positive and absolute duty, and not merely gives a discretionary power, and it must be exercised upon proof of the particular facts out of which the power arises. When therefore, the language in which the authority is conferred is only directory, permissive or enabling, for instance, when it is enacted that the person authorized "may" or "is empowered" or "shall, if he deems it advisable," or that "it shall be lawful" for him to do the act, it has been so often decided as to have become an axiom, that such expressions have a compulsory force, unless there be special grounds for a different construction: Maxwell on Stats. 218, 219; *Macdougall v. Paterson*, 11 C.B. 755; *R. v. Bishop of Oxford*, 4 Q.B.D. 525; *Cameron v. Wait*, 3 A.R., p. 194; *The Supervisors v. the United States*, 4 Wallace 446, at pp. 446, 447; *Stroud* 463.

Paid the Sum of Ten Cents.—Where a jury is required by the parties under sections 160 to 162, and properly summoned, the fees are paid by the county treasurer under section 178. Where a jury is empanelled by the judge under this section, the fees are to be paid by the clerk, and are taxable against the party who is ordered to pay the costs. Why these jurors should be paid only ten cents, while those summoned from the body of the court to act as jurors in other cases receive \$1, it is difficult to understand.

A difficulty may arise in some cases as to the repayment of the fees paid by the clerk. It seems clear, that as the jury is not called at the instance of either party, there is no obligation on the part of either to pay the fees in advance under section 58 and Rule 297. If not recoverable from either party under execution, no provision is made for their collection, and the clerk might have trouble in recovering them.

Judge may
discharge
jury not
agreeing,
etc.

175. If in any case the Judge is satisfied that a jury, after having been out a reasonable time, cannot agree upon their verdict, he may discharge them, and adjourn the cause until the next Court, and order the Clerk to summon a new jury for the next sitting of the Court for that division, unless the parties consent that the Judge may render judgment on the evidence already taken, in which case he may give judgment accordingly. R.S.O. 1887, c. 41, s. 169.

A Reasonable Time.—It is generally a matter of great difficulty for a judge to determine what is "a reasonable time." Every case must depend upon its own circumstances, and whether obstinacy, prejudice or other improper influence has found a place in the jury-room, as it frequently does, it is for the judge, as best he can, to determine that question before discharging a jury: see *Stroud*, 653.

A party upon whom it is incumbent to do a thing within a reasonable time duly fulfils his obligation, notwithstanding protracted delay, so long as such delay is attributable to causes beyond his control, and he has neither acted negligently nor unreasonably: *Hick v. Raymond*, (1893) A.C. 22, 32.

[125 (a). In all cases of trial by jury the Judge shall have power to determine after hearing the whole evidence or the evidence adduced by or on behalf of the plaintiff alone whether there is in law any evidence in support of the plaintiff's case which ought to be submitted to the jury to pass upon, and if in his opinion there is no such evidence adduced in support of the plaintiff's claim he may direct a nonsuit or dismiss the action; and in case of trial by jury the Judge may direct the jury to answer any questions of fact stated to them by him for the purpose and in such case the jury shall answer such questions and upon such answers the Judge shall enter such judgment as in his opinion may be proper. The Judge shall as in other courts determine the law and shall direct the jury thereon. 62 V., c. 11, s. 9.]

Power to direct nonsuit or dismiss action.

Submitting questions to jury.

Ought to be Submitted.—After hearing the evidence for all parties or for the plaintiff alone, if the judge thinks there is not sufficient evidence in support of the plaintiff's claim, upon which five reasonable men might find a verdict for him, he may direct a nonsuit or dismiss the action. But he is bound to hear the evidence for the plaintiff before he can do either; notes to section 120, *ante* p. 209. Having heard the plaintiff's case, "if in the opinion of the judge there is no evidence to go to a jury, the judge should have the courage of his opinion and nonsuit the plaintiff;" see remarks of Lord Esher, M.R., referred to in 31 L.J. Newspaper, p. 311.

The ruling of the judge that there is no evidence to support a particular issue may be reviewed on appeal: *McCord v. Cammell*, (1896) A.C. 57.

The first part of the section appears to add very little to the powers of the judge in jury cases. Rule 275 provides that, "In cases where the hearing is by jury, the judge has the same power to nonsuit as in ordinary cases;" and, "in ordinary cases" it is provided that "in case satisfactory proof is not given to the judge entitling either party to judgment, he may nonsuit the plaintiff;" see notes to section 120, *ante* pp. 208, 209.

Under this section the judge may either direct a non-suit or dismiss the action. As to the effect of a non-suit in jury cases, see section 213 and notes thereto, and notes to section 120, *ante* p. 210.

If, at the close of the plaintiff's case, the defendant moves for a non-suit and intimates that he will renew the motion at the close of the case, and then proceeds to call evidence, until stopped by the court, and a non-suit is entered, the defendant is liable to pay the costs of the trial and appeal, in the event of a successful appeal, although the omission to complete the evidence was in deference to the court: *Mills v. Hamilton St. Ry. Co.*, 17 F.R. 74.

Questions of Fact.—Formerly the judge could not submit questions to the jury in this way: *Re Jones v. Julian*, 28 O.R. 601. The equivalent section in the High Court is section 112 of the Judicature Act, R.S.O. c. 51. See *Canada Cent. Ry. Co. v. McLaren*, 8 A.R. 564; *St. Denis v. Baxter*, 13 O.R. 41; *Gower v. Lusse*, 16 O.R. 88; *Marks v. Windsor*, 7 O.R. 719; *Denmark v. McConaghy*, 26 C.P. 563; *Adair v. Wade*, 9 O.R. 15. The rules of the High Court are not applicable to Division Courts: *Bank of Ottawa v. McLaughlin*, 8 O.R. 543; *Building and Loan Assn. v. Heimrod*, 3 C.L.T. 361; notes to section 75, *ante* p. 109. Under C.R.

781, if the answers do not cover all the questions in issue or are so conflicting as to render it impossible to enter judgment, the result is the same as if the jury disagreed, and notice of trial may be given for the next sittings of the court; see *Stevens v. Grout*, 16 P.R. 210; *McDermott v. Grout*, 16 P.R. 215; *Faulknor v. Clifford*, 17 P.R. 363; *Brown v. Daffney*, 21 A.R. 466.

The court cannot direct a judgment to be entered contrary to the findings of the jury on any material fact. If the jury disagree or omit to answer any material question, or if their findings are inconsistent, the safer course would appear to be to adjourn the case to the next court, when it may be again submitted.

The judge has no right, when there is a conflict of evidence on a question of fact, to give judgment *pro forma* for the defendant, leaving the plaintiff to apply for a new trial with a jury: *Marshall v. Bluman*, 10 T.L.R. 85.

It is imperative on the jury to answer the questions submitted to them, and they may not give a general verdict instead, unless the judge, in his discretion, receives it: *Furlong v. Carroll*, 7 A.R. 143; and the judge's charge, in the latter case, must give them such instructions as to the law as will enable them to give a general verdict instead of answering the questions: *Reid v. Barnes*, 25 O.R. 223.

It is discretionary with the judge to submit questions to the jury: *Lett v. St. Lawrence*, 1 O.R. 545; and his refusal to do so is not a ground for new trial: *Turner v. Burns*, 24 O.R. 28.

Fees for
Jury fund.

176. There shall be paid to the Clerk of the Division Court, in addition to all costs or jury fees, now by law payable, on every action entered where the claim exceeds \$20 but does not exceed \$60, three cents; where the claim exceeds \$60, but does not exceed \$100, six cents; and where the claim exceeds \$100, twenty-five cents; and the same shall be taxed and allowed as costs in the cause; and on or before the 15th day of January in every year, every Clerk shall return to the Treasurer of the County a statement, under oath, showing the number of actions originally entered in his Court during the year previous, in which the claim exceeded \$20 but did not exceed \$60, the number in which the claim exceeded \$60, but did not exceed \$100, and the number in which the claim exceeded \$100; and he shall, with the statement, pay over to the Treasurer the sum of three cents on every action so entered where the claim exceeded \$20 but did not exceed \$60; the sum of six cents on every action where the claim exceeded \$60, but did not exceed \$100; and the sum of twenty-five cents on every action where the claim exceeded \$100, together with all other moneys received by him for jurors' fees during the year; and the Treasurer shall keep an account of all moneys so received by him under the head of "Division Court Jury Fund." R.S.O. 1887, c. 51, s. 170.

Return.

Now by Law Payable.—The fees here provided for are in addition to those fees which the party who requires a jury is obliged to pay under the provisions of sections 161, 162.

The legislature appears to have considered that a small tax should be imposed on all parties to suits entered in the Division Court with a view of providing a jury fund, and such tax or fee should be allowed as costs in the cause. It is the duty of the clerk, before the 15th of January in every year, to make the return to the county treasurer, under oath, of the requirements of this section. It is important that these returns should be duly made, otherwise the clerk will be liable to indictment for neglect of duty, and to summary treatment by the Government. See *Roseoe*, 9th ed. p. 783; *Criminal Code* 1892, s. 138.

177. In every city which includes one or more entire divisions and no other fraction of a division the Clerk shall make the return and payment, provided for by the next preceding section, to the Treasurer of such City, who shall keep an account of such moneys in the same way as is provided in the case of County Treasurers, and shall, on the presentation of the certificate of the Judge, forthwith repay to the Clerk of the Court the jurors' fees paid by him in the same manner as is hereinafter provided in the case of County Treasurers. R.S.O. 1887, c. 51, s. 171.

Return in
cities
forming
separate
divisions.

The same returns are exacted of the clerk under this provision as are required under section 176. Too much stress cannot be laid on the necessity of this, as of all other returns, being duly made.

178. The Clerk of every Division Court shall pay to every person who has been summoned as a juror, and who attends during the sittings of the court for which he has been summoned, and who does not attend as a witness in any cause, or as a litigant in his own behalf, the sum of \$1; and having so paid the same, except in the cases in the next preceding section provided for, the presiding Judge shall so certify to the Treasurer of the County, and shall deliver the certificate to the Clerk, and the Treasurer of the County shall, upon the presentation of the certificate to him, forthwith pay to the Clerk, or his order, the amount which the Clerk appears, by the certificate, to have paid the jurors as aforesaid; in the case of Cities, other than those provided for by the next preceding section, and Towns separated from the County, the amounts paid in by the Clerks of the Courts in such Cities and Towns, and the amount paid by the County Treasurer to the Clerks of such Courts for jury fees, shall be taken into account in settling the proportion of the charges to be paid by the City or Town towards the costs of administration of justice. R.S.O. 1887, c. 51, s. 172.

Fees of
jurors.

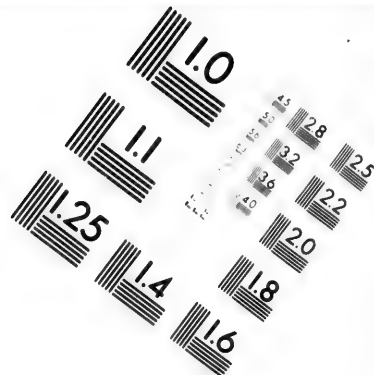
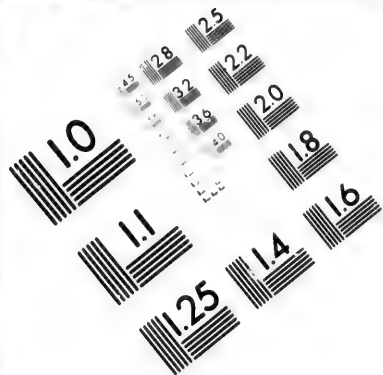
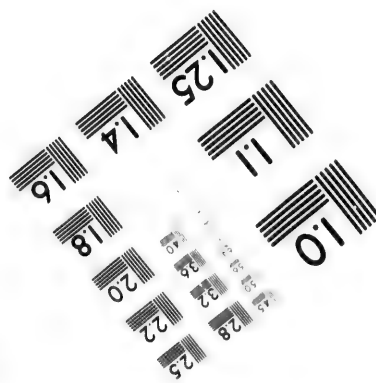
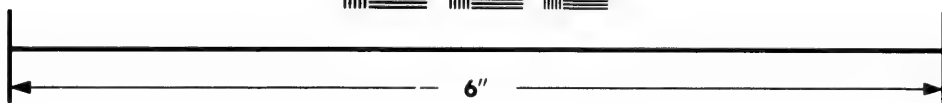
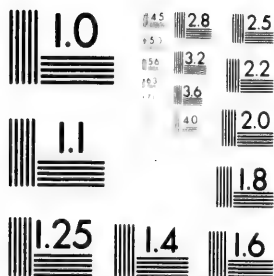


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Every Person who has been Summoned.—A juror *who has been summoned* is entitled to a fee of \$1, but one called by the judge is only entitled to 10c. under section 174: see notes to that section.

To be entitled to this fee a juror must not attend as a witness in any cause, nor as a litigant, and it makes no difference whether he is paid as a witness or not, nor whether he is subpoenaed or not. No provision is made for payment of mileage, and therefore none will be allowable.

The small fee formerly payable to jurors is not payable in addition to this. The fee here mentioned is substituted for the other. "If an Act says a juror shall have £20 a year, and a new statute enacts that he shall have twenty marks, the latter necessarily implies that the qualification required by the former Act shall not be necessary, and repeals that Act:" Maxwell on Stats. 143; Zimmer v. The G.T. Ry. Co. 21 O.R. 633; S.C. 19 A.R. 693. The same principle would apply here.

The juror is entitled to his fee, no matter whether he is sworn or challenged, or whether the case is settled or the like.

If a case is settled after a jury is summoned, the clerk should, if possible, countermand the jury summonses, so as to save the jury fees.

A person sworn under section 173 as a *tates* would, it is submitted, be entitled to this fee. The section does not say *how or when* a juror is to be summoned in order to entitle him to his fee, so that in this latter case the juror would be equally entitled to it.

PROCEEDINGS TO GARNISH DEBTS.

Garnish-
ment of
debts.

179. Subject to the provisions of the next section, when a debt or money demand of the proper competence of the Division Court, and not being a claim strictly for damages, is due and owing to one party from another party, either on a judgment of a Division Court or otherwise, and a debt is due or owing to the debtor from any other party, the party to whom such first-mentioned debt or money demand is so due and owing (hereinafter designated the primary creditor), may attach and recover, in the manner herein provided, any debt due or owing to his debtor (hereinafter designated the primary debtor), from any other party (hereinafter designated the garnishee), or sufficient thereof to satisfy the claim of the primary creditor, subject always to the rights of other parties to the debts owing from such garnishee. R.S.O. 1887, c. 51, s. 173.

GARNISHMENT OF DEBTS.

The Primary Debtors Claim.—A cause of action to be the subject of garnishment proceedings before judgment, must conform to the following requirements: (1) It must be a debt or money demand of the proper competence of the Division Court; (2) not strictly for damages; and (3) It must be due and owing to one party from another party.

In order to determine what cases the statute applies to, it is necessary to consider what construction the courts have given to these several requirements.

A Debt or Money Demand Within the Competence of the Division Court.—The words "debt or money demand" are those used in section 72 (c) and in section 113. In the notes to those sections, the meaning of the phrase has already been fully discussed; it will not be necessary, therefore, to enter into any discussion of it here.

Claims Strictly for Damages.—The following causes of action would come within the meaning of the language here used, and would not be the subject of garnishee proceedings before judgment: Actions for trespass or trover: see *Shaw v. Shaw*, 18 L.T. 420; for breach of warranty of chattels: *Northwood v. Rennie*, 28 C.P. 202; 3 A.R. 37; against an attorney for negligence: *Robinson v. Emanuel*, L.R. 9 C.P. 415; or for compromising an action against the express direction of his client: *Butler v. Knight*, L.R. 2 Ex. 109; for wrongful dismissal of a servant: *Hartland v. General Exch. Bank*, 14 L.T. 863; for not accepting goods sold: *Boorman v. Nash*, 9 B. & C. 145; for not delivering goods: *Brown v. Muller*, L.R. 7 Ex. 319; for not accepting stock sold: *Pott v. Flather*, 16 L.J.Q.B. 366; against a public carrier for negligence: *Simpson v. London & N.W. Ry. Co.*, 1 Q.B.D. 274; for breach of covenant to repair: *Henderson v. Squire*, L.R. 4 Q.B. 170; on a bond to do something besides the mere payment of a sum certain in money: *Branscombe v. Scarbrough*, 6 Q.B. 13; or on a replevin bond: *Id.*: for negligent driving of carriages or trains causing damage: *Readhead v. Mid. Ry. Co.*, L.R. 4 Q.B. 379; for injuries to workmen: *Smith v. Baker*, (1891) A.C. 225; for deceit: *Swift v. Jewsbury*, L.R. 9 Q.B. 301; *Derry v. Peek*, 14 App.Cas. 337; for excessive distress: *Fell v. Whittaker*, L.R. 7 Q.B. 120-124; for irregular distress: *Knight v. Egerton*, 7 Ex. 407; for an illegal distress: *Attack v. Bramwell*, 3 B. & S. 520; or when no rent due: *Id.* in detinue: *Wiley v. Crawford*, 1 B. & S. 253; or replevin: *Gibbs v. Cruickshank*, L.R. 8 C.P. 454; against a sheriff or bailiff for wrongfully seizing goods: *Mayhew v. Herriek*, 7 C.B. 229; or for not arresting: *Williams v. Mostyn*, 4 M. & W. 145; or for allowing a person to escape: *Macrae v. Clarke*, L.R. 1 C.P. 463; or for not levying, or a false return: *Hobson v. Thelluson*, L.R. 2 Q.B. 642; on any contract of indemnity: *Theobald v. Ry. Passengers Ass. Co.*, 10 Ex. 45; for injuries resulting from the negligent keeping of animals: *Ellis v. Loftus Iron Co.*, L.R. 10 C.P. 10; *Shaw v. McCreary*, 19 O.R. 39; for assault and battery and false imprisonment: *Warwick v. Foulkes*, 12 M. & W. 507; by principal against his agent for negligence: *Parker v. McKenna*, L.R. 10 Ch. 90; for non-delivery of telegraphic messages: *Saunders v. Stuart*, 1 C.P.D. 326; or for negligence in transmitting same: *Dickson v. Reuter's Tel. Co.*, 2 C.P.D. 62; or in an action against a witness for non-attendance on subpoena: *Yeatman v. Dempsey*, C.B.N.S. 628.

The Debt.—The debt of the primary debtor must be due *and* owing. While that of the garnishee need only be due *or* owing. The case of *Johnson v. Diamond*, 11 Ex. 73, well illustrates the principle of what is a "debt" within the phrase "debt or money demand," namely a liquidated money obligation for which, speaking generally, an action will lie: see *Webster v. Webster*, 31 Beav. 393; but which obligation may be either legal or equitable: *per* Lindley, L.J., *Webb v. Stenton*, 11 Q.B.D. 518; *Legarie v. Canada Loan & Banking Co.*, 11 P.R. 512; *Re McGibbon v. Eager*, 18 C.L.T. 311. "Due" may mean either owing or payable, and what it means is determined by the context: *Ex parte Kemp*, L.R. 9 Ch. 383; *Re Stockton Malleable Iron Co.*, 2 Ch. D. 101. The word "due" in the Act is used in the same sense as payable: see section 183, where the words are "owing to the primary debtor, whether due or not due." Money may then be said to be due at the expiration of the credit given, or at the period promised: *Webster*. To be "due *and* owing," therefore, the primary debtor must not only be indebted, but the debt must be payable: *i.e.*, past due, while to be "due *or* owing" it is only necessary

that there should be a debt contracted though not payable until a future time. There need not be a present right to sustain an action against the garnishee: *Parker v. Howe*, 12 P.R. 353. Section 199 provides, however, that no execution shall issue against the garnishee until and so far only as the debt has become fully due. Judgment may, however, be given against the garnishee at the hearing, suspending the issue of execution until the money becomes due: *Tapp v. Jones*, L.R. 10 Q.B. 592, 593. The mere possibility that when the day for payment arrives there may be a defence against the recovery of the debt is no ground for resisting judgment: *Sparks v. Young*, 8 Ir. C.L.R. 251.

Where the garnishees are co-partners the names of the individual members of the firm must be set out in the process. A garnishee summons against the firm of "A. B. & Co., is not authorized by section 112, sub-section 4: *Walker v. Rooke*, 6 Q.B.D. 631; *Reid v. McLeod*, 20 Ala. 576; and where a garnishee is not indebted in his individual capacity but is a partner in a firm, it was held, he could not be charged without his partners being made parties to the proceeding: *Rix v. Elliott*, 1 N.H. 184; see also *Parker v. Danforth*, 16 Mass. 299; but in *Clarke v. Macdonald*, 4 O.R. 310, it was said, that judgment could not in any event be given except against the partners served. As each partner is jointly liable for the debt, it is an open question whether a partner served with process in which his firm was described as garnishees, would not be sufficiently charged, in the absence of objection by him to the summons as irregular: *King v. Hoare*, 13 M. & W. 494; *Kendall v. Hamilton*, 4 App. Cas. 504. Where a judgment creditor has induced his debtor to assign his book debts to him he cannot proceed against the debtors summarily by garnishment proceedings: *Armstrong v. Douglas*, 8 C.L.T. 49.

Debts Attachable.—A fair test of a debt being garnishable is whether or not it could be the subject of set-off: *Johnson v. Diamond*, 11 Ex. 263; *Webster v. Webster*, 31 Beav. 393; *McNaughton v. Webster*, 6 U.C.L.J. 17; *McPherson v. Tisdale*, 11 P.R. 261; *Parke v. Howe*, 12 P.R. 351. Generally speaking, "money in the hands of a man who cannot refuse to pay it somehow or another is a 'debt,' and if so, it can be attached:" *per Coleridge, C.J.*, *Booth v. Trail*, 12 Q.B.D. 8. If a debt is attachable the recovery of judgment does not make it less so: *McKay v. Tait*, 11 C.P. 72. A debt due for which a cheque has been given may be attached, but if the garnishees do not stop payment of the cheque, no order for payment will be made: *Cohen v. Hale*, 3 Q.B.D. 371; *Elwell v. Jackson*, 1 C. & E. 362. Money deposited with the garnishee for a special purpose, which has failed, remains in his hands in trust and is garnishable: *Stumore v. Campbell*, (1892) 1 Q.B. 314.

All "debts," whether legal or equitable, owing to the judgment debtor, whether presently payable or not, are garnishable; but only "debts" can be attached, and moneys which may or may not become payable from a trustee to his *cestui que trust*, are not debts: *Webb v. Stenton*, 11 Q.B.D. 518, 528; *Stuart v. Grough*, 15 A.R. 299. A trustee is not an equitable debtor until there is money in hand which he ought to pay to the *cestui que trust*, or until he has made himself personally liable to pay money to the *cestui que trust*, by reason of some breach of trust or default in the performance of his duties: *per Fry, L.J.*, 11 Q.B.D. 530.

The mere fact of a garnishee being an executor is no ground for not ordering him to pay the debt due by him as executor to the judgment creditor: *Tiffany v. Bullen*, 18 C.P. 91; *Burton v. Roberts*, 6 H. & N. 93; *Fowler v. Roberts*, 2 Giff. 226; but the order in such case should show on its face that it is directed to the executor as such: *Stevens v. Philips*, L.R. 10 Ch. 417. But a debt due to an administrator as such, cannot be attached to answer his private debt: *Bowman v. Bowman*, 1 Ch. Cham. 172;.

Though the primary debtor may have taken the garnishee in execution for the debt, it is, nevertheless, attachable: *Marples v. Hartley*, 1 B. & S. 1.

Rent which is accrued though not payable may be attached and may be ordered to be paid when due to satisfy the primary debt: R.S.O. c. 170, ss. 5 and 6; but only an amount apportioned to the time of the attachment can be ordered to be paid: *Massie v. Toronto Printing Co.*, 12 P.R. 12; and when attached the collateral remedy of the landlord by way of distress is suspended: *Patterson v. King*, 27 O.R. 56. But it is doubtful if rent could be garnished as against a mortgagee of the landlord: *Massie v. Toronto Printing Co.*, *supra*; but see *Jones v. Thompson*, 27 L.J.Q.B. 234; *Davidson v. Taylor*, 14 P.R. 78, and other cases cited *infra* p. 326. If the tenants have attorned to the mortgagee there is no debt due to the mortgagor: *Parker v. Mellwain*, 17 P.R. 84; nor is there any such debt if the mortgagee has, with the assent of the mortgagor, notified the tenants to pay the rent to him: *Campion v. Palmer*, (1896) 2 Ir. R. 445. In *Christie v. Casey*, 31 C.L.J. 35, it was held *per Ketchum, J.J.*, that rent not yet payable cannot be attached under this section, as a debt to be attachable in the Division Court must be "due or owing." But *per Dean, Co. J.*, *Birmingham v. Malone*, 32 C.L.J. 717, such rent is attachable in the Division Court; see also *Webb v. Stenton*, 11 Q.B.D. 578; *Patterson v. Richmond*, 17 L.J. 324; *Re Wilson*, 5 R. 455; and see *United Club v. Hotel Co.*, W.N. (1889) 67, in which it was held that the apportioned part of rent is not "a debt," and *Burnett v. Eastman*, 67 L.J. Q.B. 517, *per Day, J.*, in which it was held that rent cannot be attached as a debt until it is due, notwithstanding the Apportionment Act.

In the High Court and County Court a garnishee process would not formerly reach a corporation, firm or individual resident out of the jurisdiction: *Canada Cotton Co. v. Parmalee*, 13 P.R. 257; *Franklin v. Owen*, 15 C.L.T. 105, 158, 185; *Boswell v. Piper*, 17 P.R. 257; *Braun v. Davis*, 9 Man. L.R. 534; *Parker v. Odette*, 16 P.R. 69; notes to section 87, *ante* p. 140. But where the debt due by the garnishee is one for which an action could be maintained in Ontario, it may now be attached although he is resident out of jurisdiction; C.R. 911. A bank authorized by Parliament to do business in Ontario, though its head office may be out of the province, is deemed to be within the jurisdiction for the purposes of the law as well as for the transaction of its business: *County of Wentworth v. Smith*, 15 P.R. 372; but an ordinary foreign corporation, although having an agency is not so resident: *Parker v. Odette*, 16 P.R. 69; *Boswell v. Piper*, 17 P.R. 257; and to justify garnishee proceedings against them the creditor must invoke the provisions of section 95 (jurisdiction by consent) sections 187 and 190 (2) (corporations having their head office out of the province but having an agent with an office, as such, within the jurisdiction).

Money payable in seven days under a judgment in favor of B. against J. was held to be attachable in the hands of J. by a judgment creditor of B. before the expiration of the time for payment: *Turney v. Burman*, 88 L.T. 65.

A judgment or order for costs only is sufficient to sustain garnishee process: *Elliott v. Capell*, 9 P.R. 35; *Re Irvine*, 12 P.R. 297. See also *Nott v. Sands*, W.N. (1883) 74; *Sunderland Local Marine Bd. v. Frankland*, L.R. 8 Q.B. 18; *Cremetti v. Crom.*, 4 Q.B.D. 225; C.R. 934.

It has been held that the following are debts and are attachable:—

The overdue superannuation of a retired police constable: *Booth v. Trail*, 12 Q.B.D. 8; *Murphy v. Green*, 26 L.R. Ir. 610. See also *Shanley v. Moore*, 9 U.C.L.J. 264; *Hall v. Pritchett*, 3 Q.B.D. 215; the superannuation of a county judge: *Willecock v. Terrell*, 3 Ex. D. 323; or civil

servant: *Sansom v. Sansom*, 4 P.D. 69; a commutation of a pension: *Crowe v. Price*, 22 Q.B.D. 429. See also *Re Webber*, 18 Q.B.D. 111; overdue rent: *Mitchell v. Lee*, L.R. 2 Q.B. 259; or money in the hands of a receiver appointed in an administration action: *Rapier v. Wright*, 14 Ch. D. 638; money due for calls in respect of shares in a company: *De Pass v. Capital and Industries Cor.*, (1891) 1 Q.B. 216; a balance due for purchase money of leaseholds, after assignment to the purchaser, and entry into possession by him: *Owens v. Shield*, 1 C. & E. 356; an ascertained amount due on a guarantee: *Bouch v. Sevenoaks, Etc.*, Ry. Co., 4 Ex. D. 138; the surplus proceeds of a sale under the powers contained in a mortgage: *Re Mead v. Creary*, 32 C.P. 1; dividends, though not declared, on an insolvent estate: *Parker v. Howe*, 12 P.R. 351; future instalments of a debt payable by instalments: *Tapp v. Jones*, L.R. 10 Q.B. 591; an amount certain payable under a bond: *Johnson v. Diamond*, 11 Ex. 73, *per Parke, B.*, at p. 80; money in the hands of bankers: *Re United Eng. and Scot. Ins. Co.*, L.R. 5 Eq. 300; *Miller v. Huddlestons*, 22 Ch. D. 233; *Rogers v. Whitely*, 23 Q.B.D. 236; (1892) A.C. 118; the proceeds of an execution in the sheriff's hands for a debt due by the execution creditor: *Murray v. Simpson*, 8 Ir. C.L.R. App. xlv.; *Re Smart v. Miller*, 3 P.R. 385; *O'Neill v. Cunningham*, 6 Ir. L.R. 503; *Williams v. Reeves*, 12 Ir. Ch. R. 173; *Re Greer*, (1895) 2 Ch. 217; a debt due to one or more of the judgment debtors upon a judgment recovered against several, may be attached in the hands of the garnishee: *Miller v. Mynn*, 1 E. & E. 1075; money in the hands of a corporation or company: *Salaman v. Donovan*, 10 Ir. C.L.R., Ap. xiii.; or of a Division Court Clerk: *Bland v. Andrews*, 45 U.C.R. 431; but the contrary has been held in England: see *Dolphin v. Layton*, 4 C.P.D. 130; *Howell v. Metrop. Dist. Ry. Co.*, 19 Ch. D. 508; or of a Division Court bailiff: *Lockart v. Gray*, 2 C.L.J. 163; a debt due to a testator's estate on a judgment against his executors as such: *Fowler v. Roberts*, 2 Giff. 226; *Burton v. Roberts*, 6 H. & N. 93; money payable for work done for a municipal corporation: *Alden v. Boomer*, 2 P.R. 339; money due under an award and decree of the Court of Chancery, although the full amount was not ascertained by reason of the costs not having been taxed: *Re Sato v. Hubbard*, 8 P.R. 445; costs coming to plaintiff though not yet taxed: *McPherson v. Tisdale*, 11 P.R. 261; or a sum to be ascertained as due to the holder of a Mechanics' Lien: *Re Withrow*, 19 C.L.J. 114; an annuity in the hands of trustees in whom it was vested was held attachable in *Nash v. Pease*, 47 L.J.Q.B. 766; and money in the hands of a trustee though not as yet due to the *cestui que trust*, in *Lloyd v. Wallace*, 9 P.R. 335; but these cases cannot now be considered as authorities: *Webb v. Stenton*, 11 Q.B.D. 518; *Stuart v. Grough*, 15 A.R. 299; money lodged in court in the name of the Master of the court was held to be the subject of a charging order: *Adams v. Gillem*, 9 Ir. C.L.R. 148; unnegotiable promissory notes, being in the same position as ordinary choses in action, are the subject of garnishment: *Oldham v. Ledbetter*, 1 Howard, (Miss) 43; *Wilhelmi v. Hafner*, 52 Ill. 222; *Colvin v. Rich*, 3 Porter, 175; money in the hands of a receiver may be attached with the leave of the court which appointed him: *De Winton v. Brecon*, 28 Beav. 200; a debt due by a company in liquidation under the Winding up Act, to a primary debtor, might be reached by garnishment, and the primary creditor would then be entitled to the dividend of the debtor: *Prichard's Claim*, 2 D.F. & J. 354; see, however, *Hunter v. Greensill*, L.R. 8 C.P. 24; *Mack v. Ward*, W.N. (1884) 16. The process should apparently be issued against the company after obtaining the leave of the court in which the winding up was being carried on: R.S.C. c. 129, s. 16.

An overdue negotiable note may be attached: *Roblin v. Rankin*, 11 S.C.R. 137; and a promissory note not yet due: *Girard v. Cyr*, 5 B.C.R. 45; but as to this, see cases *infra*.

An incomplete gift of a debt will not prevent its attachment: *Davidson v. Cochrane*, 34 C.L.J. 318.

Money payable under a contract to supply a lunch was held to be due when the purveyor had performed his part of the agreement and supplied the food and tables, etc., and when the lunch was over at 2 p.m. the amount was held to be attached by service at 5 p.m.: *Kelly v. Rider*, 11 T.L.R. 206.

A receiver may be appointed of the interest of a husband in lands of wife dying intestate: *Harris v. Harper*, 9 C.L.T. 39. Where a receiver was appointed, by way of equitable execution, to receive a pension, the court ordered that a certain sum should be applied on the judgment out of each payment, and the residue paid to the debtor, thus providing for his maintenance: *Molony v. Cruise*, 30 L.R. Ir. 99; but see as to receivers, notes to section 75, *ante* p. 113.

Claims Not Attachable.—The following have been held not to be debts within the meaning of the statute, and therefore not attachable. Damages, though after verdict, until judgment obtained: *Jones v. Thompson*, 27 L.J.Q.B. 234; a verdict on a marine policy: *Dresser v. Johns*, 6 C.B.N.S. 429; a verdict obtained in default of delivery of a chattel: *Re Searth*, L.R. 10 Ch. 234; but a verdict is now attachable before judgment: *Holtby v. Hodgson*, 24 Q.B.D. 103; *Davidson v. Taylor*, 14 P.R. 78; an unascertained claim on a fire policy: *Boyd v. Haynes*, 5 P.R. 15; *Tate v. Corp. of Toronto*, 3 P.R. 181; *Randall v. Lithgow*, 12 Q.B.D. 525; *Bank of Toronto v. Burton*, 4 P.R. 56; *Gwynne v. Rees*, 2 P.R. 282; *Simpson v. Chase*, 14 P.R. 280; and even though the amount may have been adjusted, it is not attachable; as the adjustment has not the effect of determining absolutely the amount due: *Simpson v. Chase*, 14 P.R. 280; it would be sufficient if the amount had been fixed by an award: *Victoria Mutual v. Bethune*, 1 A.R. 398; money due to Poor Law Guardians, primarily applicable to the relief of the poor, though they had become indebted in their official capacity for goods supplied: *Murphy v. Guardians Belmullet Union*, 22 L.R. Ir. 25; money in court under a judgment: *Dolphin v. Layton*, 4 C.P.D. 130; (but see *supra*, p. 324); a debt to answer a sum of money which has been ordered to be paid into court: *Re Greer*, (1895) 2 Ch. 217; money in the hands of a deputy clerk of the Crown, clerk of the County Court, or Division Court: *Dolphin v. Layton*, *supra*; or to a clerk of the peace: *Darcy v. Garrogher*, 18 L.R. Ir. 317; or of the police: *Jervis v. Peel*, 1 T.L.R. 306; *Rice v. Jarvis*, 49 J.P. 264; *Re Baird v. Nolan*, 20 O.R. 311; but in *Field v. Rice*, 20 O.R. 309, it was held by the Q.B. Divisional Court, that the question whether money taken by the police from a prisoner was a "debt" was a pure question of fact to be determined by the Division Court judge and not reviewable in prohibition: money lent to a candidate at a parliamentary election to deposit with the returning officer: *Ex parte Peek*, 33 N.B.R. 623.

Money deposited by a judgment debtor with a stock broker cannot be attached so long as the transactions are open: *Hatt v. Shaw*, 3 T.L.R. 354; nor is money deposited by a stock broker in his own name but belonging to clients: *Hancock v. Smith*, 41 Ch. D. 456.

Money in a solicitor's hands for distribution amongst creditors under a deed of composition was held not to be attachable by a judgment creditor of the debtor, as a trust had been created: *Runtz v. Longbourne*, 8 T.L.R. 568; and even if no trust has been created, and there is but a revocable mandate, the debt is not attachable before the mandate has been revoked: *Roberts v. Jones*, 61 L.J.Q.B. 523.

Where it is alleged that the right to moneys attached in the hands of a garnishee and owing to a foreign company had passed to a receiver of

the company by virtue of a winding up order made in the foreign country by the court having jurisdiction there before the date of an attaching order: see *Brand v. Green*, 12 Man. L.R. 337.

A contract to loan money creates no debt, and even though the judgment debtor may have mortgaged his property to the garnishee for the amount of a proposed loan, no attachable debt would thereby exist: *Western Wagon & Property Co. v. West*, (1892) 1 Ch. 271.

Moneys in the hands of a trustee in bankruptcy have been held to be not attachable: *Boys v. Simpson*, 8 Ir. C.L.R. 523; *Hunter v. Greensill*, L.R.S.C.P. 24; *Prout v. Gregory*, 24 Q.B.D. 281; or of a liquidator: *Mack v. Ward*, W.N. (1884) 16, or of a receiver: *Gray v. Purdy*, 5 B.C.R. 241; or of the mortgagee as the surplus of a sale of mortgaged property when sold by a prior mortgagee under his power of sale, the sale having taken place after the service of the garnishee order: *Chatterton v. Watney*, 16 Ch. D. 378, in appeal, 17 Ch. D. 259; (but the holder of a garnishee order, served after the sale, is entitled to attach the surplus proceeds of sale in the hands of the first mortgagee, *ib.*; *Re Mead & Creary*, 32 C.P. 1); claims for misrepresentation; *Roberts v. Corp. of Toronto*, 16 Gr. 236; an unascertained amount claimable under a bond: *Johnson v. Diamond*, 11 Ex. 73; a legacy in the hands of an executor, even though he promised to pay it if ordered to do so: *McDonald v. Hollister*, 3 W.R. 522; unless there has been such an account stated by the executor as would entitle the legatee to sue at law: *ib.*; *McDowall v. Hollick*, 25 L.T. Jour. 185; but see *Fleming v. Stephenson*, 28 C.L.J. 570; *McLean v. Bruce*, 14 P.R. 190; dividends payable to the wife of the execution debtor: *Dingley v. Robinson*, 2 Jur. N.S. 1145; moneys payable to the wife of a debtor by a purchaser of land conveyed to him but unpaid on the delivery of the conveyance: *Donohue v. Hall*, 24 S.C.R. 683; moneys payable on a contingency, as for purchase money before execution of conveyance: *Howell v. Metrop. Dist. Ry. Co.*, 19 Ch. D. 508; or for purchase money prior to the completion of expropriation proceedings: *Richardson v. Elmit*, 2 C.P.D. 9; *Fellows v. Thornton*, 14 Q.B.D. 335; *Nash v. Pease*, 47 L.J.Q.B. 766; *Lloyd v. Wallace*, 9 P.R. 335; moneys payable under a building contract which has not yet been fulfilled; *Gray v. Hoffer*, 5 B.C.R. 56, rent or instalments of rent not yet due; *Jones v. Thompson*, 27 L.J.Q.B. 234; *Commercial Bank v. Jarvis*, 5 U.C.L.J. 66; *McLean v. Sudworth*, 4 U.C.L.J. 233; *Christie v. Casey*, 15 C.L.J. 13; (but see *Patterson v. Richmond*, 17 C.L.J. 324; *Massie v. Toronto Ptg. Co.*, 12 P.R. 12); trust income not yet come to the hands of trustees, although when received it would be payable to the debtor: *Webb v. Stenton*, 11 Q.B.D. 518; *McFadden v. Kerr*, 12 Man. L.R. 487; *Holmes v. Millage*, (1893) 1 Q.B. 551; *Central Bank v. Ellis*, 20 A.R. 364; salary, wages or pension not yet payable: *Hall v. Pritchett*, 3 Q.B.D. 215; *Booth v. Trail*, 12 Q.B.D. 8; *Shanley v. Moore*, 9 U.C.L.J. 264; *Trust & Loan Co. v. Gorsline*, 12 P.R. 654; the half pay of an army officer: *Birch v. Birch*, 8 P.D. 163; *Lucas v. Harris*, 18 Q.B.D. 127; the salary of a police magistrate: *Central Bank v. Ellis*, 20 A.R. 364; the pay of a surgeon in Her Majesty's Navy on active service: *Apthorpe v. Apthorpe*, 12 P.D. 192. (Half-pay is given to a man in order to keep him in a state to perform his duties, if called upon to discharge them, and pay is given him to enable him to discharge his duties *in presenti*. Neither can be assigned, and not being assignable are not attachable: *Flarty v. Odlum*, 3 T.R. 681; *Apthorpe v. Apthorpe*, 12 P.D. 193; *Brenan v. Morrissey*, 26 L.R. Ir. 618); an annual gratuity from the East India Co., *Innes v. East India Co.*, 17 C.B. 351; moneys held for and not yet payable to a married woman who is restrained from anticipation: *Chapman v. Biggs*, 11 Q.B.D. 27; even when it has accrued due subsequently to the judgment against her: *Galmoye v. Cowan*, 58 L.J. Ch. 769; see *Stanley v. Stanley*, 7 Ch. D. 589; *Maedonald v. Anderson*, 9 C.L.T.

158. A sum of money awarded as damages to a married woman in an action by husband and wife for personal injuries to the latter, was held to be her separate property and not attachable in the hands of the solicitor to answer a debt of the husband: *Beasley v. Roney*, (1891) 1 Q.B. 509. Where trustees have a discretion to apply the whole or any part of income for the benefit of a judgment debtor, there is no attachable debt: *R. v. Lincolnshire (Judge)*, 20 Q.B.D. 167; *Re McInnes v. McGaw*, 30 O.R. 38; annuities or instalments of annuities not yet due: *Nash v. Pease*, 47 L.J.Q.B. 766; or interim or permanent alimony: *Re Robinson*, 27 Ch.D. 160.

It was held that money in the sheriff's hands, levied under an attachment for costs awarded by a decree in equity, remained in *custodia legis*, and was not, without further order, the property of the party who issued the attachment: *Williams v. Reeves*, 12 Ir. Ch. R. 173; money paid into court: *Jones v. Brown*, 29 L.T. Rep. 79; *French v. Lewis*, 16 U.C.R. 547; unsettled balance by one partner to another: *Campbell v. Peden*, 3 U.C.L.J. 68; but if ascertained it can: *Id.*; money sent by a father to his son as a gift, through a bank, was held not to be a debt due by the bank to the son while the father retained power to withdraw the gift: *Caisse v. Tharp*, 5 P.R. 265; money alleged to be due on an indemnity bond, the same not being capable of being set-off: *Griswold v. Buffalo B. & G. Ry. Co.*, 2 P.R. 178; wages or salary of servants to the extent of \$25: see section 174; nor the salary of a municipal officer who holds his office at the will of the corporation at a yearly salary, payable quarterly, until some part of it is overdue: *Shanley v. Moore*, 9 U.C.L.J. 264, and cases cited *ante* p. 326; nor a juror's allowance in the hands of the county treasurer: *Phillips v. Austin*, 3 C.L.T. 316; where a fund is applicable to the payment of several persons, *pari passu*, one of them cannot take garnishment proceedings and thus obtain priority over the others: *Kennett v. Westminster Improvement Comm'rs*, 11 Ex. 349; nor money in the hands of the sheriff arising from a sale of land for taxes, at the instance of creditors of the county corporation: *Wilson v. Corp. of Huron and Bruce*, 8 U.C.L.J. 136; nor the redemption moneys paid to the county treasurer by owners of land sold for taxes and banked in the name of the treasurer: s.c. 8 U.C.L.J. 135; nor surplus moneys, if any, after payment of the debts of A., which by the terms of a trust deed might be paid to the debtor or invested in land to be conveyed to him: *McKindsey v. Armstrong*, 10 A.R. 17; nor a debt due by the garnishee to a person who would be a trustee of it for the judgment debtor: *Boyd v. Haynes*, 5 P.R. 15; (but such a debt would be held now to be garnishable: *Wilson v. Dundas*, W.N. (1875) 232; *Summers v. Morphey*, 61 L.T. Jour. 140; *Webb v. Stenton*, 11 Q.B.D. 518; *Leanning v. Woon*, 7 A.R. 42); nor can money which may become due if the terms of a contract are performed be attached even though some work may have been done: *McCraney v. McLeod*, 10 P.R. 539; and though, if the contractor abandons the contract, and the contractee enter upon the work and complete it, a debt may arise by implication for the value of the work done, a garnishee summons served *before* the contractee entered upon the work will not attach such amount: *McCraney v. McLeod*, 10 P.R. 539, explained in *Parker v. Howe*, 12 P.R. 351; nor a negotiable promissory note not yet due: *Jackson v. Cassidy*, 2 O.R. 521; *Exley v. Day*, 15 P.R. 353; *Pyne v. Kinna*, 11 Ir. R.C.L. 40; *Mellish v. Buffalo B. & G. Ry. Co.*, 2 U.C.L.J. 230; 14 C.L.J. 256. But a receiver may be appointed: *Exley v. Day*, 15 P.R. 405.

Neither our Dominion nor Provincial Governments can be made garnishees, unless so declared by proper statutory authority: *R. v. McFarlane*, 7 S.C.R. 216; *Apthorpe v. Apthorpe*, 12 P.D. 192; *Gidley v. Palmerston (Lord)*, 3 B. & B. 275; *Macbeath v. Haldimand*, 1 T.R. 172; as to garnishment of civil servants see 61 Vie. c. 7 (O). Money upon

which the garnishee has a lien cannot be taken from him without such lien being first discharged: *Nolan v. Crook*, 5 Humphreys, 312; *Smith v. Clarke*, 9 Iowa, 241; *Grant v. Shaw*, 16 Mass. 341; *Curtis v. Norris*, 8 Pick. 280; *Goddard v. Hapgood*, 25 Vt. 181; *Nathans v. Giles*, 5 Taunt. 558; *Stumore v. Campbell*, (1892) 1 Q.B. 314. A liability cannot be enforced against the garnishee for a debt based on an illegal consideration: *McGlinchey v. Winchell*, 63 Maine, 31.

The County Treasurer cannot be garnished on a judgment against the Clerk of the Peace for that County for moneys which may come into the hands of such County Treasurer for said Clerk of the Peace, after the Board of Audit has passed upon his accounts, the same not being a garnishable debt: *Re Hanvey v. Stanton*, 13 C.L.J. 108; *Palmer v. Bate*, 2 Brod. & Bing. 673.

There being a specific remedy for the collection of taxes it should be held on the principle of public policy that they are not attachable: *Canada Permanent v. East Selkirk*, 13 C.L.J. 351; 14 C.L.J. 11; *London & Canadian L. & A. Co. v. Morris* (Tp.), 14 C.L.J. 58.

Voluntary payments, as for instance, the dues and assessments of members in Ontario of a benefit society, incorporated in a foreign country, cannot be reached by a receiver or by attachment: *Wintermute v. Brotherhood of Ry. Trainmen*, 19 P.R. 6.

The court refused to attach, at the instance of a judgment creditor, on a judgment *de bonis testatoris* against an executrix, funds which were lodged by her in that capacity in the bank of the judgment creditor: *Hewat v. Davenport*, 21 W.R. 78.

Where a claim is for unliquidated damages, and is referred to arbitrators there can be no garnishment until after award: *Tate v. Corp.* of Toronto, 10 U.C.L.J. 66. Where a cheque was given and duly paid, it was held there was no debt between the time of giving it and the time of payment, and no duty upon the drawer of the cheque to stop payment on being served with a garnishee order: *Elwell v. Jackson*, 1 C. & E. 362; but if the cheque had been stopped, the debt would have been attachable: *Cohen v. Hale*, 3 Q.B.D. 371. Officers of the law, whose duty it is to hold moneys for suitors, have, in the United States, been generally held exempt from garnishee process: *Staples v. Staples*, 4 Maine, 532; *Thayer v. Sherman*, 12 Mass. 441; *Riley v. Hirst*, 2 Penn. 346. A debt owing to two cannot be attached to satisfy a claim against only one of these two: *Re Smart v. Miller*, 3 P.R. 385; *McCormack v. Park*, 9 C.P. 330; *Macdonald v. Tacquah Gold Mine Co.*, 13 Q.B.D. 537; *Parker v. Odette*, 16 P.R. 69. A life interest of a tenant by the curtesy, in purchase money, is not attachable: *Palmer v. Lovett*, 14 P.R. 415.

Rights of Other Parties.—Only such property can be attached as the debtor could deal with properly and without violating the rights of other persons at the time the garnishee order is served: *Westoby v. Day*, 2 E. & E. 605; *Badeley v. Consolidated Bank*, 34 Ch. D. 536; s. e. 38 Ch. D. 238; *Re General Horticultural Co.*, 32 Ch. D. 512; *Vyse v. Brown*, 13 Q.B.D. 199; *O'Donohue v. Hall*, 24 S.C.R. 912; *Armstrong v. Douglas*, 8 C.L.T. 49; *Davis v. Freethy*, 24 Q.B.D. 519; *Beaty v. Hackett*, 14 P. R. 395; *Parker v. Mellwain*, 17 P.R. 84; *O'Connor v. Ireland*, (1897) 2 Ir. Rep. 150. An assignment in insolvency prevented garnishment: *Re Fair v. Bell*, 2 A.R. 632. An order upon a garnishee has no operation upon debts of which a judgment debtor has already divested himself by *bona fide* assignment: *Hirsch v. Coates*, 18 C.B. 757; *Ferguson v. Carman*, 26 U.C.R. 26; *Macaulay v. Rumball*, 19 C.P. 284; and when a verdict was assigned with a covenant for further assurance, and the verdict was set aside, but on a new trial a similar verdict was rendered, it was held, that the assignment covered the second verdict, and had priority over a garnishee order on the amount of the second verdict:

Davis v. Freethy, 24 Q.B.D. 519. And to make an assignment of a debt prevail over an attaching order it is not necessary that notice of the assignment should be given to the garnishee: *Brown v. McGuffin*, 5 P.R. 231, and cases there cited; *Robinson v. Nesbitt*, L.R. 3 C.P. 264; *Grant v. McDonnell*, 39 U.C.R. 412; see *Foulds v. Chambers*, 11 Man. L.R. 300; *Meriden Britannia Co., v. Howell*, 4 B.C.R. 520. A person must be made a party to garnishee proceedings before his right can be affected thereby: *Re Fair v. Bell*, 2 A.R. 632; see *Turnbull v. Robertson*, 38 L.T. 389; *Foulds v. Chambers*, 11 Man. L.R. 300.

Where a tenant by the curtesy joined in a conveyance of land to a purchaser, but had never obtained any interest in the land or purchase money, it was held that no debt legal or equitable was due to him by the solicitor for the heir, who had received the purchase money: *Palmer v. Lovett*, 14 P.R. 415. Bond holders of a railway company, whose bonds are a first charge upon the undertaking have no right to earnings of the road while operated by the company, as against an attaching creditor. Their remedy is the appointment of a Receiver: *Phelps v. St. Catharines & Niagara Central Ry. Co.*, 19 O.R. 501.

Where a Receiver is appointed of a debt, an attachment, after the appointment, without leave, would be a contempt: *Searle v. Choat*, 25 Ch. D. 723; and if the Receiver should be appointed after the attachment, the garnishee would not be justified in paying the money to the attaching creditor without the leave of the court which appointed the Receiver: *Hawkins v. Gathercole*, 1 Drew. 12; *Ames v. Birkenhead Dock Co.*, 20 Beav. 332; *Stuart v. Grough*, 15 A.R. 299.

A parol assignment of a chose in action is valid: *Trusts Cor. of Ontario v. Rider*, 24 A.R. 157; and will take priority over a subsequent attaching order: *Todd v. Phenix and United F. Ins. Co.*, 3 B.C.R. 303.

Where several garnishee summonses were issued on the same day and it afterwards appeared that all but one had been issued in a wrong division, it was held on the transfer of the latter to the court in which they should have been entered in the first instance, that the summons properly issued was entitled to take priority over the others: *Sewery v. Burk*, 16 C.L.T. 322.

In an interpleader proceeding to decide the question of title to the money garnished it was held that evidence of admissions of the judgment debtor was not admissible as against the attaching creditor either on account of any privity between them or as evidence of declaration made by a party against his own interest: *Bertrand v. Heaman*, 11 Man. L.R. 245; *Marshall v. May*, 12 Man. L.R. 381.

As to adjudication on adverse claims, see section 202 and notes thereto.

Where the assignee of a debt not only neglected to give notice of assignment, but his solicitor stood by while an attaching order was being made, and the garnishee paid the debt to the judgment creditor, the court relieved the garnishee from an order made against him prior to the garnishment under which he was liable to attachment: *Re Jones, Ex parte Kelly*, 7 C.P. 149; and see *Burneski v. Tourangeau*, 18 P.R. 263.

Where it is clear, upon the facts appearing in support of the claim of the primary creditor against the garnishee, that the moneys sought to be garnished do not belong to the judgment debtor, but to a third person, such third person should not be summoned to prove his claim but the garnishee summons should be dismissed; *Johnson v. Moody*, 12 P.R. 203; but it would be otherwise if the primary creditor could suggest a plausible ground for supposing the money to be that of the judgment debtor, or cast any doubt upon the *bona fides* of the third party's claim; *Id.*

A solicitor, by whose efforts a judgment is recovered, has a lien thereon for the costs of the action in which it was recovered, which will

have priority over a garnishee summons issued at the instance of a creditor of the client: *Berneski v. Tourangeau*, 18 P.R. 263; *Palgrave v. McMillan*, 31 N.S.R. 488; *Canadian Bank of Commerce v. Crouch*, 8 P.R. 437; *The Jeff. Davis*, L.R. 2 A. & E. 1; *Cornick v. Ronayne*, 22 L.R. Ir. 140; *Shippey v. Grey*, 42 L.T. 673; but *per Lord Watson* in *North v. Stewart*, 15 App. Cas. 463, "in the courts of common law, a solicitor's lien upon costs decreed does not prevent their attachment by other persons having claims against the judgment creditor: see *Re Knight, Knight v. Gardner*, (1892) 2 Ch. 370; see, also, *Walker v. Gurney-Tilden Co.*, 18 P.R. 274, 471.

Distinct notice of the lien must be given to the garnishee, who will then be bound to bring it to the notice of the court, and the solicitor will then be summoned under section 202. If the garnishee should not have notice, and the money should, therefore, be paid to the judgment creditor, he would be compelled to repay it if he had notice of the lien at the time of receiving the money: *Elsdell v. Conningham*, 28 L.J. Ex. 213; s.c. 4 H. & N. 871; *Hough v. Edwards*, 1 H. & N. 171; *Mercer v. Graves*, L.R. 7 Q.B. 499; *Davidson v. Douglas*, 15 Gr. 347; *R. v. Benson*, 2 P.R. 350; *Bank of Upper Canada v. Wallace*, 2 P.R. 352; *Cotton v. Vansittart*, 6 P.R. 96; *Hamer v. Giles*, 11 Ch. D. 942; *Dallow v. Garrold*, 14 Q.B.D. 543. If judgment has been given against the garnishee, and it subsequently appears that the debt was assigned prior to the garnishment, the judgment will be set aside: *Beatty v. Hackett*, 14 P.R. 395; *Moore v. Peachy*, 66 L.T. 198; notwithstanding more than 14 days may have elapsed: *McLean v. McLeod*, 5 P.R. 467; *Hobson v. Shannon*, 26 O.R. 554; 27 O.R. 115; and payment to the primary creditor was held to be no defence to an action by the assignee against the garnishee to recover the money: *Foulds v. Chambers*, 11 Man. L.R. 300.

Where, in garnishee proceedings it appears that the money is trust money, or there is reasonable suspicion that it is trust money, the *cestui qui trust* has a right under equitable procedure to come forward, provided he does so in time, and object to an order absolute being made; and he is not to be damaged by such an order merely because the garnishee will not act: *Roberts v. Death*, 18 C.L.J. 101; 8 Q.B.D. 319.

The proceedings in garnishment can have no effect to overthrow trusts in order to reach moneys supposed to belong to a debtor. Such moneys must be the property of the debtor absolutely: *White v. White*, 30 Vermont, 338; *Keyser v. Mitchell*, 67 Penn. 473.

Debts due
for wages
not to be
attached,
except as to
excess over
\$25.

180. No debt due or accruing to a mechanic, workman, labourer, servant, clerk, or employee for, or in respect of, his wages or salary, shall be liable to seizure or attachment under this Act, or any other Act relating to the attachment or garnishment of debts, unless the debt exceeds the sum of \$25, and then only to the extent of the excess. R.S.O. 1887, c. 51, s. 174. [*See also Cup. 156, s. 7.*]

Workman, Laborer, etc.—A medical health officer of a city is not an employee: *Re Macfie v. Hutchinson*, 12 P.R. 167; see also *Forsyth v. Canniff*, 20 O.R. 478; and a secretary of a company on a salary of £200 a year, was held not to be a servant within the meaning of the English Act: *Gordon v. Jennings*, 9 Q.B.D. 45; see *Lea v. Parker*, 13 Q.B.D. 835. But he would probably be an employee: *Fayne v. Langley*, 31 O.R. 254.

Wages or Salary.—The language of this section is much wider in its scope and object than the provisions of the English Act which only affects

the "wages" of any "servant, laborer, or workman," while under this provision the "wages or salary" of any mechanic, workman, laborer, servant, clerk, or employee" to the extent of \$25 is protected and exempt from garnishee proceedings subject to the provisions of the next succeeding sections. A case can hardly be conceived where the relation of employee and employer exists to which this section would not apply. The word "employee" alone, independently of the other classes of persons mentioned, shows how extensive its provisions are. It was held that a person who at a post-master's request gratuitously assisted him in sorting letters was within the phrase "person employed under the Post-Office:" *per* Parke, B., *R. v. Reason*, 23 L.J.M.C. 13. And the word "employee" means "a person employed:" *Worcester*; see *Gurney v. Atlantic, Etc., Co.*, 2 N.Y. Supr. Ct. 453. It will include the president and vice-president of a company: *Fayne v. Langley*, 31 O.R. 254. It has been contended that where a mechanic works by the piece and not by the day this clause does not apply. It is submitted that the section has application as much in one case as in the other; that work performed either one way or the other should be considered "wages" within the meaning of the section. The word "wages" would seem to apply to the personal earnings of laborers and artisans: see *Gordon v. Jennings*, 9 Q.B.D. 45; *Riley v. Warden*, 2 Ex. 59; *Sleeman v. Barrett*, 2 H. & C. 934; *Ingram v. Barnes*, 7 E. & B. 132; *Re Jones, ex parte Lloyd*, (1891) 2 Q.B. 231. It has been said that "according to the most approved lexicographers 'salary' and wages are synonymous. Both mean 'a sum of money periodically paid for services rendered.' If there is any difference in the popular sense, it is in the application to more or less honorable services:" *per* Sharswood, C.J., *Commonwealth, ex rel. Wolfe v. Butler*, 99 Pa. 542; see *Stroud*, 696, 870. The earnings of a commercial traveller, whose employment is at so much a year, terminable by a week's notice, are "salary:" *Ex parte Brindley*, 35 W.R. 596.

In the New Brunswick Act, 45 Vic. c. 17, s. 33, the word "wages" is used, and it was held that the salary of a deputy sheriff or gaoler could not be termed "wages" so as to entitle him to the exemption: *Ex parte Bowes*, 34 N.B.R. 76.

Memorandum on Summons.—See section 182 and notes thereto.

Onus of Proof.—The onus is on the primary debtor to establish the fact of the exemption: see section 181 and Rule 71.

181. Nothing in the next preceding section contained shall apply to any case where the debt has been contracted for board or lodging, and in the opinion of the Judge, the exemption of \$25 is not necessary for the support and maintenance of the debtor's family, or where the debtor is an unmarried person having no family depending on him for support, and the debt was contracted on or after the 23rd day of March, 1889. R.S.O. 1887, c. 51, s. 175; 52 V. c. 12, s. 23.

Board or Lodging.—The word "board" means "food, diet, provision;" "the customary meals obtained for a stipulated sum at the table of another; as, he pays a high price for his board;" *Worcester*; and the verb to board is defined by the same author as "to live in a house at a certain rate for eating; to be furnished with food or meals for a stipulated sum." It would not be necessary under this section that there should be any stipulated sum in order to constitute a debt for board. A person boarding with another would impliedly be responsible to the latter for

Saving clause as to certain debts.

what such board might reasonably be worth. The law would imply a contract to pay for it, unless it appeared that it was given gratuitously, and not with the intention of being charged for.

A "lodger," generally speaking, "is a person whose occupation is part of a house, and subordinate to, and in some degree under the control of a landlord or his representative, who either resides in or retains the possession of or dominion over the house generally, or over the outer door, and under such circumstances that the possession of any particular part of the house held by the lodger does not prevent the house being in the possession of the landlord." It is always important in determining whether a man is a lodger to see whether the owner of the house retains his character of master of the house, and whether he occupies a part of it by himself or his servant, and at the same time retains the general control and dominion over the whole house, and this he may do though he do not personally reside on the premises: *per* Bovill, C.J., *Thompson v. Ward*, L.R. 6 C.P. 360, 361; see also *Phillips v. Henson*, 3 C.P.D. 26; *Nes v. Stephenson*, 9 Q.B.D. 245; *Morton v. Palmer*, 51 L.J.Q.B. 7; *Heawood v. Bone*, 13 Q.B.D. 179.

The section applies to any one who boards or lodges another for reward as well as to the assignee of the debt contracted therefor.

In the Opinion of the Judge.—This means "according to the judgment of the judge:" *Omerod v. Todmorden Co.*, 8 Q.B.D. 664; see also *R. v. London (Bishop)*, 24 Q.B.D. 213; *Julius v. Oxford (Bishop)*, 5 App. Cas. 214. "Where, as in a multitude of Acts, something is left to be done according to the discretion of justices or other authorities on whom the power of doing it is conferred, the discretion must be exercised honestly and in the spirit of the Act, otherwise the act done would not fall within the statute. 'According to his discretion' means, it is said, according to the rules of reason and justice, not private opinion, according to law, and not humor; it is not to be arbitrary, vague, and fanciful, but legal and regular. And it must be exercised within the limits to which an honest man, competent to the discharge of his office, ought to confine himself, that is, within the limits, and for the objects intended by the legislature." See also *Macbeth v. Ashley*, L.R. 2 Scotch App. 352, *per* Cairns, L.C.; *Julius v. Oxford (Bishop)*, 5 App. Cas. 214; *R. v. Marylebone*, C.C. 34 Sol. J. 459; and other cases cited in note on the word "may" and other enabling words, *ante* p. 315.

Necessary for the Support, etc., of the Debtor's Family.—The judge by such evidence as may be brought before him or as he may require, will have to determine whether under the circumstances the \$25 is "necessary" or not. The language used is of that class which it is unnecessary to define; its construction depending upon the particular circumstances of each particular case. See *Johnson v. Crook*, 12 Ch.D. 639; *Webster v. Overseers of Ashton-under-Lyne*, L.R. 8 C.P. 281, 306; *Gladstone v. Padwick*, L.R. 6 Ex. 203; *Re Duke of Newcastle*, L.R. 8 Eq. 700; *Hatton v. Haywood*, L.R. 9 Ch. 229; *Whimsell v. Giffard*, 3 O.R. 1.

It is submitted that a broad and liberal interpretation should be given to the language used. The word "support" is defined as, "to furnish with the means of living, as a family; to provide for, to maintain, to supply," and maintenance means, "supply of the necessities of life, sustenance, subsistence, livelihood, support:" *Worcester*.

Education is included in the phrase "Maintenance and support," as applied to children: *Re Breed*, 1 Ch.D. 226. It may, therefore, be stated, in a general way, that in determining whether the exemption is "necessary" or not, the health of the debtor, his age and ability to work, the number of his family, their age and sex and state of health, and also their ability to work, whether they or the debtor have employment, and other circumstances may be fit subject of enquiry; and if the

\$25 should be considered by the judge, in view of all the circumstances of the case, to be necessary for the purpose of obtaining the necessities of life and sustaining in an ordinary way the debtor's family, the exemption should be allowed.

The word "family" might here mean the wife and children only of the debtor; but it is submitted that the construction to be given to it should not be of so restricted a character. The word has a variety of meanings and is controlled by the context. The primary legal meaning is "children;" *per* Jessel, M.R., *Pigg v. Clarke*, 3 Ch. D. 674. In popular acceptance it includes parents, children, servants, and all those whose domicile or home is in the same house, and under the same management or head: *Cheshire v. Burlington*, 31 Conn. 329. In its more ordinary acceptation it signifies all the relatives who descend from a common root; in its most extensive scope, all the persons who live under the authority of another: *Galligar v. Payne*, 34 La. An. 1058; and another and more comprehensive definition is, "a number of persons who live in one house and under one management or head: *Poor v. Hudson Ins. Co.*, 2 Fed. R. 438. And a mother and sister were held to constitute a "family" within the exemption of earnings clause in a statute of the State of Kansas: *Seymour v. Cooper*, 26 Kansas, 539.

Unmarried Person.—The effect of the section in its present form is, that in the case of an ordinary debt the exemption does not apply to an unmarried person having no family dependent on him for support, the amount coming to him, no matter how small, being garnishable. In the case of a debt contracted for board or lodging there will be no exemption in any case unless, "in the opinion of the judge the exemption of \$25 is necessary for the support and maintenance of the debtor's family." In the case of a married person, having a family depending on him for support, if the debt is contracted for anything except for "board or lodging," the exemption applies.

Onus of Proof.—Where an exemption from garnishment is claimed under this and the 180th sections of the Act, it shall be necessary for the primary debtor to establish the fact of such exemption: Rule 71.

Ordinarily the rule would be that the debtor would have made out a *prima facie* case on bringing himself within section 180, by showing that the debt garnished was for wages or salary, and that he was married or, if unmarried, that he had a family depending on him for support, and the onus of proof would then have been shifted to the primary creditor to prove the facts under this section.

182.—(1) In all cases under the provisions of sections 186 and 190 of this Act where the debt sought to be garnished is for wages or salary, there shall be upon, or annexed to the summons served on the garnishee, a memorandum showing the residence of the primary debtor and the nature of his occupation in the service of the garnishee at the time of the issuing of the summons (if then in such service), and also stating whether the debt alleged or adjudged to be due by the primary debtor to the primary creditor was or was not incurred for board or lodging, and in the absence of such last mentioned statement the said debt may be presumed by the garnishee not to have been incurred for board or lodging. R.S.O. 1887, c. 51, s. 177.

Memoran-
dum on
garnishee
summons
where debt
attached is
for wages.

Debts due
by
unmarried
persons.

(2) If the debt is alleged or adjudged to be due by an unmarried person having no family depending on him for support, a statement to that effect shall be upon or annexed to the summons served on the garnishee; and in the absence of such statement, such unmarried person may be presumed by the garnishee to have a family depending on him for support. 57 V. c. 23, s. 17.

Memorandum on Summons.—For form of memorandum required under this section, see Form No. 71, and additional Form No. 256.

In the absence of the notice that the debt was contracted for board and lodging, the garnishee would be justified in presuming that the debt was not so contracted. If the debtor is unmarried and has no family dependent on him for support it is necessary to give notice of that fact as well, and if not given such unmarried person may be presumed by the garnishee to have a family depending on him for support. The section was originally intended, no doubt, for the protection and relief of railway and other corporations and large employers of labor who, prior to these provisions, were obliged to await the result of the trial before paying the amount due by them. As now framed these provisions will be found to be a great convenience to all classes of persons who are unfortunate enough to be made parties to garnishee proceedings, as the absence of the notices required by this section will permit payment of the exception of \$25 provided for in section 180 without waiting for the decision of the court.

Some Facts to be Set Forth in Particulars.—The memorandum required by this section, showing the residence of the primary debtor and the nature of his occupation in the service of the garnishee, if he is then in such service, and whether the debt alleged to be due was or was not incurred for board or lodging, shall be set forth in the statement of plaintiff's claim and the copies thereof furnished to the clerk, and endorsed upon or annexed to the summons, as required by this section: Rule 73.

Warning to be Endorsed on Summons.—The warning (Form 73a) shall be endorsed on or subjoined to the attaching order issued under 178, and on the summons referred to in sections 181 and 185, s-s. 1; Rule 72.

Where the Creditor's Claim is a Judgment.

Attaching
order to be
granted on
judgment.

183. After judgment has been recovered in a Division Court, application may be made to a Judge of the Court, by or on behalf of the primary creditor, on affidavit that such judgment was recovered, and when, and that the whole, or some part, and how much, thereof remains unsatisfied, and that the deponent has reason to believe, and does believe, that some one or more parties (naming them, or stating that he is unable to name them) is or are within this Province, and is or are indebted to the primary debtor, for an attaching order (which the Judge is hereby authorized to make), to the effect that all debts owing to the primary debtor, whether due or not due, be attached to satisfy the judgment; which order

may be in the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts. R.S.O. 1887, c. 51, s. 178.

Judgment Recovered.—That is duly entered by the clerk in the procedure book, or by the judge: see notes to section 114. A judgment more than six years old could be enforced in this way: *Fellows v. Thornton*, 14 Q.B.D. 335.

It will be observed that this, and the following sections, make provision for an attaching order being obtained, which, *when served*, shall have a certain effect: see section 184, and notes. A proceeding by attaching order only exists in cases where judgment has been recovered. Where judgment has not been recovered, a summons should be issued under section 190. An assignee of a judgment, though the action should not have been renewed in his name, might proceed under this and the following sections: *Goodman v. Robinson*, 18 Q.B.D. 332; *McLean v. Bruce*, 14 P.R. 192; *Smart v. Miller*, 3 P.R. 385.

On Affidavit.—The affidavit on which to obtain an attaching order may be made by the solicitor of the judgment creditor or by a partner of the solicitor, or by any person having knowledge of the facts: Rule 68; *Re Sato v. Hubbard*, 8 P.R. 445. It will be observed that the deponent's belief that a debt is due is sufficient: see *Vinall v. DePass*, (1892) A.C. 90; *Coren v. Barne*, 22 Q.B.D. 249. The affidavit must also state the nature of the debt sought to be attached, and the amount thereof, if known to the deponent, or that after careful enquiry he has been unable to ascertain the amount thereof: Rule 68.

Proceedings on such order could not be prohibited on the ground that they were founded on a defective affidavit: *Re Sato v. Hubbard*, *supra*.

Naming Them or Stating That he is Unable to Name Them.—This authorizes what may be called "a roving garnishee order." Delay sometimes occurs in getting an ordinary garnishee summons issued and served. An attaching order enables a judgment creditor, so soon as he finds anybody who is indebted to his judgment debtor, to attach the debt, without first resorting to the issue of a summons. To obtain payment he must, however, issue the summons provided for in the next section.

Within the Province.—In a garnishment proceeding, by way of attaching order, it is necessary that the garnishees should be resident within the province. A company having its chief place of business out of the province, could not, therefore, be affected by an attaching order: *Canada Cotton Co. v. Parmelee*, 13 P.R. 308; *Boswell v. Piper*, 17 P.R. 257; *Guy v. G. T. Ry. Co.*, 10 P.R. 372; *Ahrens v. McGilligat*, 23 C.P. 171; and other cases cited in notes to section 179, *ante* p. 323, and notes to section 87, *ante* p. 140. A bank authorized by Parliament to do business in Ontario, although its head office be out of Ontario, is deemed potentially and actually within the jurisdiction of Ontario for the purposes of the law as well as for the transaction of its business: 53 Vic. c. 31, s. 64, *et seq.* (D.): *County of Wentworth v. Smith*, 15 P.R. 372.

It would appear, however, by reading sections 105, 186, 187 and 190 together, that non-resident garnishees may be proceeded against, provided they carry on business in the province through an agent who has an office *as such* therein. See notes to sections 105 and 179, *ante* pp. 167, 323.

For form of affidavits, see Forms 43, 44.

Is or Are Indebted.—See notes to section 179.

Owing Whether Due or Not Due.—It is submitted that these words have substantially the same significance as the words "any debt is due or owing" in section 179: see that section and notes thereto.

In the Form.—See Form No. 73, and Form 73 (a).

Service of Order.—It is the service which is effectual. Until the order is served it has no efficacy: *Re General Horticultural Co., Ex parte Whitehouse*, 32 Ch. D. 512; *Tate v. City of Toronto*, 3 P.R. 181, and where a garnishee was advised by telegram that the money had been garnished, but paid the money nevertheless to the debtor before service, it was held that the debt was not attached: *O'Donovan v. Dillon*, 24 L.R. Ir. 442.

Effect of the Order.—An attaching order binds only such debts as the debtor can honestly deal with without affecting the rights of the other parties: *Parker v. Mellwain*, 17 P.R. 84; and a prior equitable assignment will have priority over the attaching order: *Ex parte Whitehouse*, 32 Ch. D. 512. It binds "all debts then owing" from the garnishee to the primary debtor. It is to be observed that nothing is bound but a "debt." Should there be merely a contingent liability or a claim sounding in damages it should not be bound or affected by the order. Care should, therefore, be taken by the garnishee, that he pays nothing but a debt. Where a garnishee was subject to a liability for unliquidated damages, and allowed a garnishee order absolute to be made by default against him, and afterwards the claim became liquidated by an award, and the money was then claimed under a prior assignment by third parties, it was held that the garnishee had no right to interplead, and that he merely had himself to blame in not appearing and showing to the court that there was no attachable debt due: *Randall v. Litagow*, 12 Q.B.D. 525. And where a garnishee had notice of an assignment of a debt due by him for rent and allowed the attaching order to be made, and afterwards paid the rent as required by the order, he was held liable to pay the same again to the assignee: *Foulds v. Chambers*, 11 Man. L.R. 300.

Until an order to pay is obtained, the primary debtor has the right to enforce all his remedies against the garnishee. If, therefore, the debtor has a judgment and execution, the garnishee should pay the amount to the sheriff advising him at the same time of the existence of the attaching order: *Genge v. Freeman*, 14 P.R. 330. This is equivalent to payment into court, inasmuch as the payment is to an officer of the court, in trust for the proper person: *Turnbull v. Robertson*, 38 L.T. 389. After a garnishee order absolute, an execution against the garnishee issued by the primary debtor would be stayed: *Re Connan, Ex parte Hyde*, 20 Q.B.D. 690.

It is next to be observed that *all* debts are attached. Where a debtor had £6,800 on deposit with the garnishees, and an attaching order was made to satisfy a judgment of £6,000, it was held that under the terms of the order, the garnishee was justified in refusing to pay cheques for the balance over £6,000: *Rogers v. Whiteley*, 23 Q.B.D. 236; (1892), A.C. 118. An order might be made, however, restricting the attachment to such amount as will satisfy the judgment debt, but care must be taken that no part is released, unless it is clear that the whole amount due by the garnishee is the beneficial property of the judgment debtor: *Ib.* The application should not be made *ex parte*; Rule 81; see notes to section 200. The garnishee should not pay any amount to the judgment debtor, until after the summons to be issued under section 185 has been disposed of, and judgment given ordering payment by the garnishee: *Turner v. Jones*, 1 H. & N. 878; *Sykes v. Brockville & Ottawa Ry. Co.*, 22 U.C.R. 459; *Tate v. Corp. of Toronto*, 10 U.C.L.J. at p. 67.

Payment into court will be an effectual discharge of the garnishee if the amount due by him was an attachable debt, and the court had jurisdiction: *Culverhouse v. Wickens*, L.R. 3 C.P. 295; *Mayor of London v. Cox*, L.R. 2 H.L., at pp. 261, 262, and even if the court has no jurisdiction, if the garnishee without collusion and in ignorance of the want of

jurisdiction, pays under compulsion of the attachment, he will be protected: *Banks v. Self*, 5 Taunt. 234; *Harrington v. McMorris*, 5 Taunt. 228; *Westoby v. Day*, 2 E. & B. 605; *Wood v. Dunn*, L.R. 1 Q.B. 77; L.R. 2 Q.B. 73. But where money belonging to a person was paid into court on proceedings against another person of the same name as the person entitled thereto, and afterwards paid out to him on an order of the court, it was held that the proceedings did not protect the garnishee against the claim of the person rightfully entitled to the moneys: *Andrews v. Canadian M.L. & Inv. Co.*, 29 O.R. 365. The effect of binding all debts in the hands of the garnishee, is to give the primary creditor the security of the garnishee to the extent of his indebtedness. Indeed, it was once said that: "The moment the order of attachment is served upon the garnishee, the property in the debt due from him is absolutely transferred from the judgment debtor to the judgment creditor;" *per James, L.J., Ex parte Joselyne, Re Watt*, 8 Ch. D. 327 at p. 330; *Emanuel v. Bridger*, L.R. 9 Q.B. 290; *Low v. Blackmore*, L.R. 10 Q.B. 485; but this was but a colloquial expression, and meant nothing more than that the debt was bound: *per Brett, L.J.: Chatterton v. Watney*, 17 Ch. D. 261; and see *per Cotton, L.J., and Jessel, M.R.*: "the order does not transfer the debt;" *Ib.* 262, and it is now clear that a garnishee order does not transfer the debt: *Re Combined Weighing & Ad. M. Co.* 43 Ch. D. 99; *Wood v. Joselin*, 18 A.R. 60; *Re Thompson*, 17 P.R. 109.

Until an order to pay is obtained against the garnishee, the primary creditor holds no judgment against him. After such order is obtained, the primary creditor is entitled to have a judgment summons issued against the garnishee; section 255; *Cowan v. Carlill*, 52 L.T. 431; but see *Re Hanna v. Coulson*, 23 O.R. 493; 21 A.R. 692; and *Re Dowler v. Duffy*, 29 O.R. 40.

The proceedings in garnishment are purely collateral to the action between the primary debtor and the primary creditor, and when the right of the primary creditor to enforce his claim in the main proceeding is at an end, the charge upon the debt in the hands of the garnishee drops with it. The primary creditor never becomes a creditor of the garnishee. The garnishee continues to be a debtor to his own creditor, until he has paid into court, or to the attaching creditor, after order so to pay, or a levy of the amount has been made of his property, when he ceases to be a debtor to the amount paid or levied: *Wardrope v. Canadian Pacific Ry. Co.*, 7 O.R. 321; *The Combined Weighing & Ad. M. Co.*, 43 Ch. D. 99; *Barnard v. Molson*, 15 S.C.R. 716; but the judgment creditor's right against the garnishee, would be defeated by a discharge in insolvency, in the same manner as that of an ordinary creditor: *Kent v. Tompkinson*, L.R. 2 C.P. 302. Inasmuch as the primary creditor never becomes a creditor of the garnishee, the amount payable by the garnishee to him, cannot be garnished for a debt due by the primary creditor: *Cooper v. Lawson*, 6 T.L.R. 34. Although the order of attachment creates no debt as between the primary creditor and garnishee: *Re Combined Weighing & Ad. M. Co.*, *supra*, it seems that it gives the primary creditor a right of action for the debt attached: *Pritchett v. English and Colonial Syndicate*, (1899) 2 Q.B. 428. The rights of the primary creditor as against an assignee for the benefit of creditors, a sheriff claiming under an Order for Attachment or under the Creditor's Relief Act, and the holders of *Meehan's Liens*, will be found considered in the notes to section 202.

If there are several attaching orders they rank in the order of their service: *Tate v. Corp. of Toronto*, 3 P.R. 181; *Sweetnam v. Lemon*, 13 C.P. 534; but only to the extent of the debt due at time of service: *Parker v. Howe*, 12 P.R. 353. If a claim is entered in the wrong court,

and is not transferred until a valid garnishment summons has been issued from that court, the latter will retain priority: *Sewrey v. Burk*, 16 C.L.T. 322.

The order does not give any right to the securities for the debt, and where a mortgagee of leasehold property was a judgment debtor and a garnishee order was served on the mortgagor, it was held that the judgment creditor had no interest in the land and was not entitled to a surplus in the hands of a prior mortgage, after a sale of the mortgaged premises: *Chatterton v. Watney*, 16 Ch.D. 378; 17 Ch.D. 259.

Service
thereof to
bind all
debts, etc.

Garnishee
may pay
his own
discharge.

184. The service of the order on a garnishee shall have the effect (subject to the rights of other parties) of attaching and binding in his hands all debts then owing from him to the primary debtor, or sufficient thereof to satisfy the judgment, and a payment by the garnishee into the Court, or to the primary creditor, of the debt so attached to the extent unsatisfied on the judgment, shall be a discharge to that extent of the debt owing from the garnishee to the primary debtor. R.S.O. 1887, c. 51, s. 179.

The Service.—The service of a garnishee summons is regulated by sections 188 and 191 and by Rules 74 to 76. The service should, if possible, be personal: or at least it should be shown that the order came to the knowledge of the garnishee: *Ward v. Vance*, 3 P.R. 130; *Mason v. Moggeridge*, 18 C.B. 642; *Newman v. Rook*, 4 C.B.N.S. 434; or that reasonable attempts have been made and proved fruitless, and the judge has dispensed with personal service: see Rule 76; *Tomlinson v. Gontly*, L.R. 1 C.P. 230; Rules 74 to 76, 86 (h) and 183. As to substitutional service, see notes to sections 104, 105, and also notes to sections 179, 183, and 187.

Service on the local agent of a foreign insurance company who had power merely to receive and transmit applications was held a good service: *Simpson v. Chase*, 14 P.R. 280.

Warning to be Endorsed on Order.—The garnishee must be warned upon every attaching order and garnishee summons not to pay the debt to the primary debtor; and the warning (Form 73a) must be subjoined to the attaching order: Rule 72.

Payment to
any but
primary
creditor
void.

185. Any payment by the garnishee, after service on him of the order, to any one other than the primary creditor, or into Court, to satisfy the judgment, shall to the extent of the primary creditor's claim, be void; and the garnishee shall be liable to pay the same again, to the extent of the primary creditor's claim, to satisfy the judgment unless the Judge otherwise orders. R.S.O. 1887, c. 51, s. 180.

Any Payment.—The garnishee should not make any payment, except into court, until after the summons mentioned in section 186 has been heard and an order for payment made: see cases cited in notes to section 184. If the service of the order is not good the garnishee could, probably, pay over the money to the primary debtor with impunity: *Cooper v. Brayne*, 3 H. & N. 972, Am. ed. So also if there was no attachable debt: *Randall v. Lithgow*, 12 Q.B.D. 525; *Stuart v. Grough*, 15 A.R. 299.

Payment into court would protect the garnishee if an attachable debt existed at the time of the service of the order: *Culverhouse v. Wickens*, L.R. 3 C.P. 295; see remarks of Willes, J., at p. 297. To discharge the garnishee there must be an attachable debt and either payment made under compulsion of law or execution levied: *Sykes v. Brockville & O. Ry. Co.*, 22 U.C.R. 459; *Carr v. Bayeroff*, 4 U.C.L.J. 209; *McNaughton v. Webster*, 6 U.C.L.J. 17.

The payment to the creditor must be made by compulsion of law: *i.e.*, some process of law which amounts to compulsion. And this is indispensable for the indemnity of the garnishee and, therefore, indispensable in order that the garnishee should be bound: *Mayor of London v. London Joint Stock Bank*, 6 App. Cas. 400; *Stuart v. Grough*, 15 A.R. 305. But if the garnishee pay the money into court and allow it to be paid out to the wrong person he will not be protected: *Andrews v. Canadian M. L. & Inv. Co.*, 29 O.R. 365.

No payment made by a garnishee to a primary creditor before judgment shall discharge him from his liability unless an order for such payment has been first obtained from the judge: Rule 79. The payment to the primary debtor is also ineffectual as against the claim of the primary creditor. Money paid by the garnishee to the primary debtor could not be recovered back if it was paid voluntarily, unconditionally and with full knowledge and recollection of the attaching order: *Billie v. Lumley*, 2 East. 469; *Townsend v. Croudy*, 8 C.B.N.S. 477; *Perry v. Newcastle*, 8 U.C.R. 363; *Montreal Ass. Co. v. McCormick*, 25 U.C.R. 440; *Baldwin v. Kingstone*, 18 A.R. 63, 83, 98, 109, 672; *Stewart v. Ferguson*, 31 O.R. 112.

Liable to Pay the Same Again.—The liability of the garnishee to pay the claim of the judgment creditor, notwithstanding the intermediate payment to the judgment debtor, is but the logical consequence of the attachment which effectually binds the debt: see notes to section 184.

Payment into Court.—Where a garnishee pays money into court and the primary creditor does not accept it in satisfaction of the amount sought to be attached, the money shall not be paid out until after judgment, and any costs awarded to the garnishee shall be deducted therefrom and paid to the garnishee: Rule 79 (*d*).

The garnishee must pay the money into court five clear days before the day appointed for the trial; compliance with this rule absolves him from payment of any costs incurred by the primary creditor: Rule 80. The clerk must notify the primary creditor forthwith, and if he elects to accept the money he must notify the clerk and the garnishee by post, or leave with the clerk a written notice stating such acceptance within forty-eight hours after the receipt of the notice of payment into court. The proceedings against the garnishee are therefore stayed and the money so paid into court is to be applied upon the judgment against the primary debtor: Rule 80 (*a*).

If the amount paid into court be not accepted the judge shall, upon the return day determine as to the liability of the garnishee, and as to the party by whom the costs of the action shall be paid, and make such order as may be in accordance with such determination: Rule 80 (*b*).

If the primary creditor fails to send the notice of acceptance as required by the rule it will be presumed that he elects to proceed: Rule 80 (*c*).

It frequently happens that although there is a liability by the garnishee to the debtor there is no debt: see notes to section 179, and payment into court would in such case not discharge the garnishee: see notes *supra*.

It is to be noted that if the primary creditor does not notify the garnishee of the acceptance of the money, it is presumed that he does not accept and the garnishee must govern himself accordingly. The garnishee is entitled to receive notice of any defence set up by the debtor or of any notice filed by the primary creditor: see Rule 86; notes to section 193.

Primary
creditor
may
summon
garnishee.

186. Whether such attaching order is or is not made, the primary creditor may cause to be sued out of the Division Court for the division in which the garnishee, or one or more of them, if there be joint garnishees, resides or carries on business, a summons in the form prescribed by the General Rules or Orders, from time to time in force, relating to Division Courts, upon or annexed to which shall be a memorandum showing the names of the parties as designated in the judgment, the date when, and the Court in which, it was recovered, and the amount unsatisfied; which summons shall be returnable either at any ordinary sittings of the Court, or at such other time and place (to be named therein) as the Judge may permit or appoint, either by a general order for the disposal of such matters or otherwise. R.S.O. 1887, c. 51, s. 181.

Joint Garnishees.—This phrase has not been judicially interpreted in any reported case. It is probable that it would be held to extend only to a case where the garnishees were jointly liable. Otherwise garnishees from all corners of the province might be summoned to a distant court merely because they, and a person with whom they had no joint interest, happened to have a common creditor.

Resides or Carries On Business.—See notes to sections 84 and 105, and see also notes to sections 103, 188 and 191, as to the service of the summons. If the garnishee be a foreign firm or individual having, however, an agent in the province who has an office *as such agent*, it is possible that the garnishee would sufficiently carry on business within the division where such agent had his office, to justify the issue of process therefrom: see section 105. Care must be taken, even in the case of a foreign firm, to make the individual partners garnishees: Walker v. Rooke, 6 Q.B.D. 631; see also notes to sections 179 and 184.

A Summons.—For form of summons, see Forms 72, 73.

In Which It Was Recovered.—It is submitted that if an attaching order has been issued, a summons may be issued from any court in which a garnishee resides or carries on business, but if no attaching order has been issued and if the judgment was recovered in a division in which no garnishee "resides or carries on business" the judgment must be transferred under section 223, and Rule 78; and then, on the judgment being *fully entered* in the court of the division in which the garnishees or one or more of them reside or carry on business, all proceedings can thenceforth be entitled and taken in that court as if originally commenced and judgment "recovered" there.

At Such Other Time and Place.—This would allow the judge to appoint any "time and place" within the county for the disposal of such matters. It is submitted that justice and the convenience of parties will be best served by trying such matters at regular sittings only, unless under exceptional circumstances.

Rule 78 provides that where the summons is to be issued from any other court than that in which the primary debtor has obtained judgment, a transcript of such judgment shall be filed with the clerk of such first mentioned court, previous to the issuing of the summons: see notes to section 223.

187. In proceedings under the preceding section, where the garnishees are likewise a body corporate, not having their chief place of business within the Province, then the summons mentioned in said section shall be issued from the Division Court in which the judgment has been recovered, and shall be served upon the agent of the body corporate, whose office as such agent is either within the division in which the judgment has been recovered, or is nearest thereto. R.S.O. 1887, c. 51, s. 182.

Service on corporation, whose head office is not in the province.

A Body Corporate.—The late Chief Justice Marshall, of the Supreme Court of the United States, defines a corporation as: "An artificial being, invisible, intangible, and existing only in contemplation of law:" *Dartmouth College v. Woodward*, 4 Wheaton, 518, 636.

See also notes to section 190, sub-section (2).

Not Within the Province.—What has been said in the notes to sections 105 and 184, has also application here. See also section 190, sub-section (2).

In Which the Judgment Has Been Recovered.—This section has only application to cases "in which judgment has been recovered." Where there is no judgment, provision is made for service of a garnishee summons under sections 190 and 191.

Judgment may be said to be "recovered" in cases not tried when the decision of the case has been duly entered by the clerk in the procedure book: see *Smith v. Logan*, 17 P.R. 219; or when given by the judge, in cases which are tried: *Stratton v. Johnston*, 7 L.C.G. 141; *R. v. Rowland*, 1 F. & F. 72; *Dews v. Riley*, 11 C.B. p. 443; *Tubby v. Stanhope*, 5 C.B. 790. It is submitted that "judgment has been recovered" within the meaning of this section only in that court in which judgment was originally entered, and that this provision does not apply to cases of judgment on transcript.

Service on Agent.—See section 190, sub-section (3), and notes to section 105.

Nearest Thereto.—Distance is measured as the crow flies, in a straight line. The point in the division nearest to the agent's office should be taken as the starting point. The place of sitting has nothing to do with the question in this case: see *Mouflet v. Cole*, L.R. 8 Ex. 32.

188. A copy of the summons and memorandum shall be duly served on the garnishee, or, if there be joint garnishees, then on such of them as are within reach of the process, at the time and in the manner required for the service of summonses in ordinary actions for corresponding amounts, and also on the primary debtor, if thought advisable, or if required by the Judge. R.S.O. 1887, c. 51, s. 183.

Mode of service.

Service of Summons.—The service on the garnishee must in all cases be made at least ten days before the return thereof, and the service on the primary debtor ten or fifteen days (according to the places of residence of the parties) before the return thereof: Rule 74: see notes to sections 100, 103, 105 and 184. As the proceedings against a garnishee are effectual only on service, it is submitted, that if the garnishee should die before service, the debt could not be reached without proceedings against his representative: *Re Easy, Ex parte Hill v. Hymans*, 19 Q.B.D. 538.

If the amount of the primary debtor's claim exceeds \$15, the service shall be personal unless the judge otherwise orders, but if the claim does not exceed \$15, the service may be personal, or on his wife, or servant, or some grown person being an inmate of the dwelling house or usual place of abode, trading or dealing of the person requiring to be served: Rule 74. These provisions are similar to those contained in section 103, and the notes to that section will apply to this.

The primary debtor must, in all cases, be served with the summons, but if the service is not made the judge may either dispense with such service or adjourn the case until it be effected: Rule 75.

The judge in any garnishee proceeding may order substitutional service: Rule 76.

Apart from the requirements of the section and Rule 75, the summons should, in all cases be served on the primary debtor: *Ferguson v. Carman*, 26 U.C.R. 26; *Beaty v. Hackett*, 14 P.R. 395. The result of the proceeding must be to incur costs, and no judgment debtor should have his credits reduced or his debts increased without an opportunity of being heard: *McLean v. Allen*, 14 P.R. 84. At common law every person whose rights are to be affected by any legal proceeding has a right to be heard: *Maxwell on Stats.* 325; *Thorburn v. Barnes*, L.R. 2 C.P. 384; *Re Pollard*, L.R. 2 P.C. 106. The debtor should know of the proceedings, for the judgment upon which they were founded might possibly have become *effete*; or if the debt had been assigned, and no notice given by the assignee (as he is bound to do: *Robinson v. Nesbitt*, L.R. 3 C.P. 264), the proceeding would lead to a great deal of trouble or injustice. The judge should not, for any reason of mere convenience, dispense with the service but insist on its being made in every case if practicable: 10 C.L.J. 65, 66. Attempts should at least be made to serve the party, and evidence of these presented to the judge. Whether or not the efforts made are reasonably sufficient is a matter for the discretion of the judge. *Tomlinson v. Goatly*, L.R. 1 C.P. p. 231, *per Erle*, C.J. See notes to section 184 and also notes to section 104, *ante* p. 163, as to substitutional service.

Defences in Garnishee Proceedings.—The garnishee is entitled to set up any defence as between the primary creditor and the primary debtor which he would be entitled to set up in an ordinary action, and also such defence as between the garnishee and the primary debtor and show any other just cause why the debt should not be paid over or applied on the claim: Rule 86. As to procedure in such defences see section 193 and notes.

Joint Garnishees.—See notes to sections 101 and 186.

If Thought Advisable.—The rules now provide for service on the primary debtor and no doubt give effect to the intention of the legislature as expressed here, which seems to be to leave the question of service on the primary debtor to the discretion of the judge: see notes *supra*, also notes to section 181 as to the exercise of such discretion.

189. At the hearing of the summons, or at any adjourned hearing, on sufficient proof of the amount owing by the garnishee to the primary debtor, and no sufficient cause appearing why it should not be paid and applied in satisfaction of the judgment, the Judge may give judgment against the garnishee (which judgment may be in the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts), for the amount so owing from him, or sufficient thereof to satisfy the judgment; and execution against the garnishee to levy the same, may issue thereon as of course, if due, or when and as it becomes due, or at such later period as the Judge may order, which execution may be according to the form prescribed as aforesaid. R.S.O. 1887. c. 51, s. 184.

Judgment
at hearing.

At the Hearing of the Summons.—To "hear a cause or matter means to hear and determine it." And "unless there be something which by natural intendment, or otherwise, would cut down the meaning, I apprehend there can be no doubt that the Legislature, when they direct a particular cause to be heard in a particular court, mean that it is to be heard and finally disposed of there. And further, when they say that it is to be heard—(meaning heard and finally disposed of)—in a particular court, they mean, unless there is something in the context which either by natural interpretation or by necessary implication would cut it down, that in all matters which are not provided for that court is to follow its ordinary procedure:" *per* Lord Blackburn, *Re Green*, 51 L.J.Q.B. 44; or, as Lord Selborne, L.C., put it in the same case, "Hearing" includes not only its necessary antecedents, but also the necessary or proper consequences: *Green v. Penzance*, 6 App. Cas. 657; *Stroud*, 342.

Sufficient Proof.—See notes to section 192.

A judge of a Division Court has no jurisdiction to give judgment against a garnishee without proof of the amount owing by the garnishee to the judgment debtor; and for such a course prohibition will lie: *Re Johnson v. Therrien*, 12 P.R. 442. This decision has been adopted by Rule 86 (*h*), which provides that "If the garnishee or the primary debtor, having been served, does not appear on the return of such summons the judge may proceed to hear the case and may give judgment against him in his absence, but except where an admission of liability has been filed, as in the preceding part of this Rule is provided, no judgment shall be given against any garnishee or primary debtor, either for want of notice of defence or for default of appearance without sufficient proof of the debt or amount due or owing by him as required by section 187 (now section 192) of the Act. As to defences see section 193.

No Sufficient Cause Appearing.—that is, no question arising which the judge has to try.

May Give Judgment.—Judgment should not be given against a garnishee if there is any suggestion that the debt has been assigned, or is not the beneficial property of the debtor. Such suggestion may come either from the debtor or the garnishee: *Lovely v. White*, 12 L.R. Ir. 381.

If the garnishee has a lien upon the money, judgment can only be given for the balance due after satisfying the lien: *Nathans v. Giles*, 5 Taunt. 558; *Nolen v. Crook*, 5 Humphrey, 312; *Smith v. Clarke*, 9 Iowa, 241; *Grant v. Shaw*, 16 Mass. 341; *Curtis v. Norris*, 8 Pick. 280;

Goddard v. Hapgood, 25 Vermont, 181; or if he is entitled to any set-off: Hesse v. Buffalo, B. & G. Ry. Co., Chambers 30th March, 1857, *per* Robinson, C.J.; Nedley v. same defendants, 3 U.C.L.J. 111; or if the debtor is bound to indemnify him against a claim for which he is liable: Rymill v. Wandsworth Dist. Bd., 1 C. & E. 92; but a mere cross-claim, which cannot be set-off, or which would amount only to a counterclaim, would not entitle the garnishee to resist judgment for the full amount of the debt: Stumore v. Campbell, (1892) 1 Q.B. 314.

No set-off will be allowed the garnishee of a debt due by the judgment creditor to him: Sampson v. Seaton & Beer Ry. Co., L.R. 10 Q.B. 28; but if the garnishee had obtained judgment against the primary creditor, the judgment might be set-off under section 219.

Form Prescribed.—See Form No. 114.

Amount so Owed.—The Legislature here clearly intended to use no uncertain expression, but employed a word meaning a debt *whether past due or maturing*.

To Satisfy the Judgment.—This would include the costs of recovering judgment, and which form part of it; but would not, in itself, cover the costs of garnishment proceedings, to meet which section 197 was introduced in 1880.

And When It Has Become Due.—The order went in this form in Tapp v. Jones, L.R. 10 Q.B. 591; see notes to section 179. No different mode of payment can be substituted than that which exists between the primary debtor and garnishee: Turner v. Jones, 1 H. & N. 878; and the garnishee will not be compelled to pay until the term of credit expires: Harding v. Barratt, 3 U.C.L.J. 31.

Form Prescribed as Aforesaid.—See Form No. 144.

Where the Primary Creditor's Claim not a Judgment.

Where no judgment, summons on garnishee, etc., to issue.

190.—(1) Where judgment has not been recovered for the claim of the primary creditor, he may cause a summons in the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts, to be issued out of the Division Court of the division in which the garnishee, or one or more of them, if there be joint garnishees, live or carry on business, upon or annexed to which shall be a memorandum, showing the names of the primary creditor, the primary debtor, and of the garnishee, and the particulars of the claim of the primary creditor, with reasonable certainty and detail; which summons shall be returnable as required by section 186 of this Act, in respect to the summonses therein mentioned.

Where garnishees are corporation out of province.

(2) In the event of the garnishees being a body corporate, not having their chief place of business within the Province, then the summons shall be issued out of the Division Court for the division in which the cause of action arose, and shall be served upon the agent of the body corporate, whose office, as such agent, is nearest to the place where the cause of action arose.

(3) Every person who within Ontario transacts or carries on any business of, or business for such body corporate, shall for the purpose of this section and of section 187 be deemed the agent thereof. R.S.O. 1887, c. 51, s. 185.

Who may
be deemed
agent.

The Claim.—That is "a debt or money demand," as mentioned in section 179.

With Reasonable Certainty and Detail.—As to requisites of particulars generally, see section 113 and notes, *ante* p. 187, and Rules 3 to 7, and where claim is a promissory note or instrument in writing, see Rule 255.

For particulars in garnishee proceedings, see section 182 and notes, *ante* p. 334.

Where the debt sought to be garnished is for wages or salary, the memorandum required by section 182 shall be set forth in the statement of claim: Rule 73.

Body Corporate.—Sub-section 2 applies only to "a body corporate," and not to a partnership merely, though trading or doing business under a corporate name. Section 105, *ante* p. 166, provides for service on foreign corporations, firms and individuals who have agents *as such* within Ontario. It would seem that a foreign garnishee, not being a corporation, could not be reached by garnishee process: *Parker v. Odette*, 16 P.R. 69; *Boswell v. Piper*, 17 P.R. 257; *Canada Cotton Co. v. Parmalee*, 13 P.R. 308, and other cases cited in notes to sections 87 and 179, *ante* pp. 140, 343. But a chartered bank doing business in Ontario, under the authority of Parliament, although its head office is out of Ontario, is deemed potentially and actually resident in Ontario, for the purposes of the law as well as for the transaction of business: 53 Vic. c. 31, s. 64, *et seq.* (D.): *County of Wentworth v. Smith*, 15 P.R. 372. Where the debtor resides out of Ontario, an action must be brought in a division in which the cause of action arose, or partly arose: section 87. That section was not intended to apply to a garnishee claim at all. *Re Franklin v. Owen*, 15 C.L.T. 158, 185.

If a garnishee should be resident in the division where an action may properly be brought against a person not resident in Ontario, it would seem probable that that court would then have jurisdiction.

Chief Place of Business.—See notes to section 105.

Cause of Action Arose.—See notes to section 84 and notes *supra*.

A garnishee proceeding under this section is an "action" or "cause" within the meaning of section 91, and may be transferred from a wrong to a proper forum under that section: *Re McCabe v. Middleton*, 27 O.R. 170; and a garnishee summons under this section may be issued out of the division in which the garnishee resides or carries on business notwithstanding that the cause of action did not arise, and that the primary debtor does not reside or carry on business there: *Ib.* But garnishee proceedings do not come within the provisions of section 151 as to applying for a new trial within fourteen days: *Hobson v. Shannon*, 26 O.R. 554, 27 O.R. 115; following *McLean v. McLeod*, 5 P.R. 467, see section 203 and notes thereto.

Service on an Agent.—For form of affidavit of service see Form No. 74. The definition of an agent will be seen to include any person who has an office as agent for the company: see notes to section 105, *ante* p. 167, and Rules 2 (22), and 21. An agent for an insurance company whose powers are limited to receiving and transmitting applications is an agent: *Simpson v. Chase*, 14 P.R. 280.

But the fact that there is in Ontario an agent of a foreign insurance company upon whom service of process may be made for the purposes mentioned in the Ontario Insurance Act, section 66, does not make such company resident in Ontario within the meaning of C.R. 911: *Boswell v. Piper*, 17 P.R. 257.

Nearest to the Place, etc.—See notes to section 187.

Service on
garnishees.

191. A copy of the summons and memorandum shall be duly served on the garnishee, or if there be joint garnishees, then on such of them as are within reach of the process, at the time and in the manner required for service in ordinary cases; and also, if practicable, on the primary debtor, unless the Judge for sufficient reasons dispenses therewith. R.S.O. 1887, c. 51, s. 186.

Service of Summons.—See notes to section 188, *ante* p. 342, and Rule 74.

Dispenses Therewith.—Service on the primary debtor must be made in all cases unless the judge dispenses therewith: Rule 75; and if not made the judge may, on such terms as to him may seem meet, adjourn the case until such service be effected: *Ib.* The judge may also order substitutional service: Section 104; Rule 76.

It is submitted that in cases under this section, there being no judgment against the primary debtor, he has a clear right to notice of the proceedings and that his property should not be taken away without an opportunity being given him to be heard. Dispensing with service upon him would have this result. It must therefore be intended merely to allow the judge the same discretion in these cases as in ordinary actions, and that the discretion thus given should be reasonably and judicially exercised: see notes to sections 8, 174, and 188. If the primary debtor cannot be found the proper course would seem to be to order substitutional service under section 104 and Rule 76; and proper efforts should first be made to effect the service. The judge may prescribe in what way the service is to be made: see notes to sections 104 and 188.

If the primary debtor is a foreigner who does not carry on business through an agent in this province no Division Court but that in which the cause of action arose or partly arose would have jurisdiction over him: see cases cited in notes to section 190.

Judgment
in such
case.

192.—(1) If in such case the primary debtor has been duly served with a copy of the summons and memorandum, judgment (in the usual form in other cases) may be given against him at the hearing for the primary creditor, for the whole, or such part of the claim as is sufficiently proved, and execution may afterwards issue thereon as in other cases; and whether such judgment is or is not given, the Judge, on sufficient proof of the debt due and owing from the primary debtor, and also of the amount owing to him from the garnishee, may then, or at any adjourned hearing, give judgment against the garnishee (which may be according to the form prescribed as aforesaid) for the amount so found due from the garnishee, to the extent of the amount so found due

from the primary debtor, which sum the garnishee shall pay into Court, or to the primary creditor, towards the satisfaction of the claim, or in default thereof, execution may issue to levy the same forthwith, or at such later period as the Judge may direct, which execution may be according to the form prescribed as aforesaid. R.S.O. 1887, c. 51, s. 187.

(2) If no defence has been entered by the primary debtor and the primary creditor before the trial abandons the claim against the garnishee, final judgment may be entered for the claim of the primary creditor and costs by the Clerk as if there had been no garnishee proceedings. 60 V. c. 14, s. 9.

Where
primary
debtor
enters no
defence.

Has Been Duly Served.—See sections 188 and 191. It seems clear from the words used that service, either personally or its equivalent, is compulsory, and the clause "and whether such judgment is or is not given," etc., may be read as subject to the precedent requirements of service. The time and manner of service is provided for by Rule 74, cited in notes to section 188, *ante* p. 342.

Sufficiently Proved.—See notes to section 189. Proof of the debt due by the garnishee must be given: *Re Johnson v. Therien*, 12 P.R. 442; Rule 86 (h); and it would seem that under this section a strong argument may be presented that "sufficient proof" of the debt due and owing from the primary debtor must also be presented, and that reliance cannot be placed on section 115 so as to enable judgment by default to be entered. But *quære* whether want of proof is not merely an irregularity and not ground for prohibition: *Hooper v. Hill*, (1894) 1 Q.B. 659.

Is or Is Not Given.—The adjudication against the primary debtor and garnishee need not be made at the same time, nor embraced in one order, but it frequently is so: see *Victoria Mut. Ins. Co. v. Bethune*, 1 A.R. 434.

There can be no judgment against the garnishee until *final* judgment is recovered against the primary debtor: see *Washburn v. N. Y. & V. M. Co.*, 41 Vermont 50; *Emanuel v. Smith*, 38 Ga. 602; and if judgment against the primary debtor be reversed, that against the garnishee should also be reversed: *Rowlett v. Lane*, 43 Texas, 274; and restitution will then be ordered: *McKindsey v. Armstrong*, 11 P.R. 200.

The garnishee's liability must be affirmatively shown, and it always devolves upon the primary creditor to make out his case against the garnishee: *Webster v. Gage*, 2 Mass. 503; *Porter v. Stevens*, 9 Cushing, 530; *Re Johnson v. Therien*, 12 P.R. 442.

Sufficient Proof.—See Rule 86 (h), also notes to section 189, and notes *supra*.

Form Prescribed.—Form No. 119.

Amount so Found Due.—This only refers to the debt, and would not, but for section 197, include the amount of the creditor's costs. The judgment was formally final and conclusive: *per Moss, J.*, at pp. 431, 433 and 434 of 1 A.R.; but provision is now made for appeal in cases in which the sum in dispute upon the appeal exceeds \$100: see section 154. In other cases it is still final, subject to the right of the judge to set it aside or grant a new trial.

A married woman would be subject to judgment as a garnishee. Her separate property, however, would only be bound: *Bank of Montreal v.*

Richardson, 34 C.L.J. 329; Palliser v. Gurney, 19 Q.B.D. 519; Scott v. Morley, 20 Q.B.D. 120; notes to section 113, *ante* p. 189.

For form of a judgment against a married woman in action of contract see Form 86. Judgment against her could easily be adapted.

The provisions of section 116 as to speedy judgments do not apply to garnishee proceedings: Cameron v. Allen, 10 P.R. 192. Judgment can only be given as provided for in this section. If some of the parties required to be served are not served, the judge may give the same judgment against those served as in ordinary cases: see Rules 86 (*i*), 116, 129, and notes to section 113, *ante* p. 189.

General Provisions.

All parties
interested
may show
cause, etc.

193.—(1) In cases under this Act, and whether the claim of the primary creditor is or is not a judgment, the primary debtor, the garnishee and all other parties in anyway interested in, or to be affected by the proceeding, shall be entitled to set up any defence, as between the primary creditor and the primary debtor, which the latter would be entitled to set up in an ordinary action, and also any such defence as between the garnishee and the primary debtor, and may also show any other just cause why the debt sought to be garnished should not be paid over or applied in or towards the satisfaction of the claim of the primary creditor.

Defences in
garnishee
proceed-
ings.

(2) A primary debtor or garnishee who desires to set up a statutory or other defence or set-off or to admit his liability in whole or in part for the amount claimed in such action, shall file with the Clerk the particulars of such defence or set-off, or an admission of the amount due or owing by the primary debtor or the garnishee, as the case may be, within eight days after service on him of the summons, and the Clerk shall forthwith send by mail to each of the said parties to the action a copy of such defence, set-off or admission, and the primary creditor may file with the Clerk a notice that he admits the defence or set-off or accepts the admission of liability as correct; a copy of the notice shall be sent by the Clerk by mail forthwith to the garnishee, and in the absence of any notice of defence or set-off from any primary debtor or garnishee, the Judge may, in his discretion, give judgment against such primary debtor or garnishee; and in the event of the primary creditor failing to file a notice admitting or rejecting such defence, set-off or admission of liability, the garnishee shall not be bound to attend at the trial, and the sum admitted to be due or owing by the garnishee, shall be taken to be the correct amount of his liability, unless the Judge shall otherwise order, in which latter case the garnishee shall be notified by the Clerk and

shall have an opportunity of attending at a subsequent date and being heard before judgment is given against him.

(3) The costs of all notices required to be given under this section, shall be costs in the cause, and in no case shall be payable by the garnishees, unless specially ordered by the Judge. R.S.O. 1887, c. 51, s. 188. Costs.

In Any Way Interested.—This section gives an extensive power to all parties concerned to defeat the claim of the plaintiff. The garnishee, or any other party interested, may dispute the claim of the primary creditor against the primary debtor, and likewise the primary debtor or any third party may defeat, so far as the primary creditor is concerned, the claim against the garnishee. Ordinarily the defences of the Statutes of Frauds and Limitations are personal, but under this section third parties would be allowed to set them up and defeat a claim which the party liable did not care himself to defeat.

Parties Intervening.—Rule 69 for the first time provides procedure for making an intervening party disputing the right of attachment a party to the action. Its provisions are as follows: "Any person, other than the primary creditor, primary debtor or garnishee who wishes to avail himself of the benefit of the first sub-section of section 188 (now section 193) of the Act may apply to the judge for directions how to proceed. Upon such application the judge may, upon such terms as he shall think just, add any one or more persons as a party or parties to the action, either as a primary creditor or intervener, or otherwise as he may determine, and may dispose of all matters in dispute, and make such order or orders as to costs as he might have done if such person or persons had originally been parties to the action."

Should trust funds be sought to be garnisheed, any one of the *cestuis que trustent* could, under these provisions, be made a party as "intervener."

An intervener would not be able to set up a counterclaim which the primary debtor might have against the primary creditor, but he might plead a primary debtor's set-off. Compare Rule 28. If there should be a contest between primary creditors as to the right to the debt garnisheed, it would appear to be proper to add the third party as a primary creditor.

See also section 202 and notes *infra*.

Between Garnishee and Primary Debtor.—If the primary creditor fails in his action, or judgment is given in favor of the primary debtor, and there is a controversy between the primary debtor and the garnishee, if they both so desire the case may be proceeded with to its termination as between them in the same way as if they were respectively plaintiff and defendant in an ordinary action, and "all the consequences shall follow thereafter, whatever be the state of the cause, as would ordinarily follow, and the same remedies and judgment shall be afforded and rendered in all respects as between them as there would supposing the primary creditor had not been a party to the proceedings:" Rule 70.

The rule has adopted the modern principle of deciding all questions in dispute in the action while the parties are before the court. The consent or desire of the parties to have the case disposed of in this way need not be in writing, nor need there be any formal application if all parties are present. If the desire is once expressed it cannot be withdrawn, and the court thenceforward possesses full jurisdiction to decide the controversy, but it is submitted that no judgment beyond the

jurisdiction of the court can be given: see section 76, and Rule 114 cited in the notes to that section. See also *Mead v. Creary*, 32 C.P. 1.

The judgment given under this rule would be a final adjudication and would bind the parties: see notes to section 7. And either party would have the right to apply for a new trial, and the garnishee, as defendant, would be subject to examination as a judgment debtor. For form of judgment see Form 120.

Any Defence.—A set-off would be a defence.

Just Causes Why Debt Should Not Be Paid Over.—The following are suggested as arguable reasons for not ordering the money to be paid over:—

- (a) Not a debt.
- (b) Not the property of the debtor.
 - (1) Assignee.
 - (2) Prior attachment.
 - (3) Absconding debtor.
 - (4) Creditors Relief Act.
 - (5) Mechanics Lien.
- (c) Subject to a lien.
 - (1) By garnishee.
 - (2) By solicitor of debtor.

The judge may adjudicate upon any of these claims at the hearing, if all parties are present, or may make the adverse claimant a party and summon him; see section 202 and Rule 77. Ordinarily, it will be found more convenient to issue a summons. If all parties should be present, and the rights clear, a summons will be unnecessary: *Wintle v. Williams*, 3 H. & N. 288; *Victoria M. F. Ins. Co. v. Bethune*, 1 A.R. 420; Rule 251.

It is incumbent on the garnishee, if he knows of any just cause why the money should not be paid over, to bring the cause to the notice of the court. If the money should not be a *debt* within the meaning of the attachment clauses, he might have to pay twice: *Randall v. Lithgow*, 12 Q.B.D. 525; *Victoria Mut. Ins. Co. v. Bethune*, 1 A.R. 423; or if the court has no jurisdiction, and the garnishee is aware of the fact; or if the money is paid into court by mistake in a proceeding against a person of the same name as the person entitled to it: *Andrew v. Canadian M. Loan and Inv. Co.*, 29 O.R. 365; see notes to section 184. If he has notice before the hearing of an assignment, or of bankruptcy, he would be bound to show cause, and if he were to pay to the primary creditor, instead of showing cause, the assignees could recover the debt from him: *Wood v. Dunn*, L.R. 2 Q.B. 73; *Foulds v. Chambers*, 11 Man. L.R. 300; *Meriden Britannia Co. v. Bowell*, 4 B.C.R. 520. If he had notice of any facts which might bring the money within any of the suggested cases above mentioned, he should for the same reason show cause. If he should not have notice of any of these causes, before judgment, but should receive same afterwards, and before paying the money three courses are open to him: (1) He may pay without taking any further step, which is unsafe unless there is no time to get the judgment set aside before execution; (2) he may move to set aside the judgment, and ask the court to bring in the third party; (3) he may give notice to the third party that unless he moves to set aside the judgment, the money will be paid thereon: *Wood v. Dunn*, L.R. 2 Q.B. 73, reversing L.R. 1 Q.B. 77. If the third party has knowledge of the judgment and does not move he may be estopped from claiming the money from the garnishee. *Berneski v. Tourangeau*, 18 P.R. 263.

Should the money be paid to the judgment creditor, the third party will not be without remedy, as he may recover the money, if he is entitled to it, from the judgment creditor, as money received to his use: *Wood v. Dunn*, L.R. 2 Q.B. 77. *Quære*: Whether notice to the judgment creditor at the time of receiving the money, that it is the property of a third party, is necessary: *Sisdell v. Cunningham*, 4 H. & N. 871. It would seem to be proper for the claimant, before suing the primary creditor for the money, to move under section 200, for an order discharging the debt from the claim of the primary debtor.

Sub-section 2—Defences in Garnishee Proceedings.—Rule 86, except sub-clauses (h) and (i), practically repeats the provisions of this sub-section. It is, therefore, unnecessary to do more than merely refer to it. Sub-clause (h) is declaratory of the law as laid down in *Re Johnson v. Therien*, 12 P.R. 442: see notes to section 189; and sub-clause (i) provides that if only some of the parties are served, the judge may give the same judgment against those served as in ordinary cases: see notes to section 192.

Statutory or Other Defence or Set-off.—It will be observed that this sub-section has application not only to any statutory defence which the primary debtor or garnishee may have, but also to *any other defence or set-off*. Formerly it applied only to statutory defences and to set-off as in the case of an ordinary action. But these provisions were introduced by the Act of 1886 (49 Vic. c. 15, section 12). As to the defence of set-off, Statute of Limitations, and other statutory defences: see notes to section 134.

Within Eight Days.—This means exclusive of the day of service: see notes to section 90, sub-section (3); *Stroud*, 889.

In *Simpson v. Chase*, 14 P.R. 284, Mr. Justice Osler said: "The section 188, sub-section 2, is most awkwardly and loosely drawn, but I am disposed to think that even if the defence of the garnishee was put in after the expiration of the eight days after service, so long as it was put in in sufficient time to enable the creditor to give notice rejecting it, and for the clerk to transmit such notice to the garnishee, the latter would not be bound to attend the trial if such last mentioned notice was not given and the creditor would not be able to proceed to the trial of the action, until that was done. The object of the section is to relieve the garnishee from the expense of attending the court and defending the case if the creditor will accept his admission of liability, or will tell him that he will not dispute his defence. The onus of doing this is on the creditor, and the garnishee having filed his defence or admission, need not concern himself further unless the former warns him that he must be prepared to support it."

Judgment cannot be given against the garnishee without proof of the amount owing by him to the judgment debtor, even though no notice be given, there being nothing in this sub-section which repeals the condition precedent in section 189 to the judge's giving judgment against the garnishee: *Re Johnson v. Therien*, 12 P.R. 442; Rule 86 (h).

Costs.—See section 196.

Judgment Against Primary Debtor or Garnishee.—See Rule 86 (h) cited *supra*. The old Rule 56, provided that judgment might be given against the garnishee by default, but it was apparently not cited in *Re Johnson v. Therien*, 12 P.R. 442. Under this rule no judgment can be given against either the garnishee or primary debtor without "sufficient proof of the debt or amount due or owing by him."

Service of
summons
on
garnishee
to bind
debt until
hearing.

194. In all cases under this Act, (except where an attaching order has been served, which is already provided for), service of the summons on the garnishee shall have the effect of attaching and binding in his hands (subject to the rights of other parties), the debt sought to be garnished, from the time of the service until a final decision made on the hearing of the summons; and any payment of the debt by the garnishee during such period, to any one other than the primary creditor, or into Court for satisfying his claim shall, to the extent of the claim be void, and the garnishee shall be liable to pay the same again to the extent required to satisfy such claim unless the Judge otherwise orders. R.S.O. 1887, c. 51, s. 189.

Attaching and Binding.—See notes to section 184, *ante* p. 338: No payment made to the primary creditor before judgment given against the primary debtor shall discharge him from his liability unless an order for such payment has been first obtained from the judge: Rule 79.

Until a Final Decision Made.—When the judge fully decides the matter the "attaching and binding" shall be at an end unless judgment is given against the garnishee: see *Belhouse v. Mellor*, 4 H. & N. 116. Should the judge adjourn the case the garnishment would still hold. Judgment against the primary debtor and garnishee may be given at different times, but there must be a *judgment* against the primary debtor before anything can be awarded against the garnishee; see notes to sections 179 and 184.

Payment into Court.—See notes to section 185. The safer course is to pay the money into court: *Sykes v. Brockville & O. Ry. Co.*, 22 U.C.R. 459; *Culverhouse v. Wickens*, L.R. 3 C.P. 295; but this is not an absolute protection, as if the amount was not a debt at the time of service, or if the court is without jurisdiction, or if the debt was assigned before the service: see notes to section 193, *ante* p. 350.

If the garnishee pays money into court, and the primary creditor does not accept, in satisfaction of the amount sought to be attached, the sum so paid into court shall not be paid out until after judgment, and any costs which shall have been awarded to the garnishee shall be deducted therefrom and paid to the garnishee: Rule 79 (a).

The primary creditor must elect within 48 hours after receipt of notice of payment: Rule 80 (a).

The payment into court must be made five clear days before the day appointed for trial: Rule 80; and if "upon the return day," the amount paid in be not accepted, the judge is to determine as to the liability of the garnishee to pay any further sum and as to by whom the costs of the action, or any part thereof, shall be paid: Rule 80 (c).

If the primary creditor does not send or deliver notice to the clerk of his acceptance of the money paid into court it is presumed that he elects not to accept the same and the action shall proceed according: Rule 80 (c).

If the primary creditor does not file a notice admitting or rejecting the admission or denial of the garnishee the latter is not bound to attend at the trial.

See section 193 (2), and Rule 86 (f) for subsequent proceedings in such cases. The dictum of Osler, J., *Simpson v. Chase*, 12 P.R. 284, cited in notes to section 193, is also applicable.

Claim be Void.—"It has been said that when a statute declares a contract void, but imposes a penalty for making it, it is not voidable merely. In general, however, it would seem that where an enactment has relation only to the benefit of particular persons, the word 'void' would be understood as 'voidable' only at the election of the person for whose protection the enactment was made, and who are capable of protecting themselves, but that where it relates to persons not capable of protecting themselves, or where it has some object of public policy in view which requires the strict construction the word receives its natural full force and effect: *Maxwell on Statutes*, 190; *Johnson v. Martin*, 19 A.R. 592.

Unless the Judge Otherwise Orders.—This the judge would probably do if the primary creditor had by his words or acts, assented to the payment by the garnishee to any other than himself of the moneys garnished: *Re Jones, Ex parte Kelly*, 7 C.P. 149; *Freeman v. Cooke*, 2 Ex. 654; *Johnson v. Credit Lyonnais Co.*, 3 C.P.D. p. 40; *De Busche v. Alt*, 8 Ch. D. 286; *Re Bohia & San Francisco Ry. Co.*, L.R. 3 Q.B. 584 and that class of cases.

195. If judgment be given for the primary creditor against the garnishee, the debt garnished shall, unless the Judge otherwise orders, continue bound in the hands of the garnishee to satisfy the claim of the primary creditor; and payment in such case by the garnishee of the debt to the extent of the claim, either into Court or to the primary creditor, shall, to that extent, be a discharge to the garnishee, as between him and the primary debtor; and any payment of such debt, otherwise than as last aforesaid, except by leave of the Judge, shall be void; and the garnishee in such case shall be liable to pay the same again to satisfy the claim of the primary creditor. R.S.O. 1887, c. 51, s. 190.

And after judgment.

Continue Bound in the Hands of the Garnishee.—This section provides for the security of the primary creditor after judgment.

The debt garnished continues to be bound after judgment, unless the judge otherwise orders, and any payment made by the garnishee, except as directed by this section, or by the leave of the judge, would be void, and the garnishee would be liable to pay the same again for the purpose of satisfying the primary creditor the amount of his claim: see also notes to sections 179 and 185.

Discharge to the Garnishee.—The payment by the garnishee under the order of the court satisfies the liability of the garnishee to the primary debtor to the extent of the amount paid, and the primary debtor to such extent ceases to be a creditor of the garnishee: *Wardrope v. C.P. Ry. Co.*, 7 O.R. 321. But the section only protects a garnishee against being called upon by a primary debtor to pay over again and does not protect him against any third person: *Andrew v. Canadian Mutual Loan & Inv. Co.*, 29 O.R. 365.

Shall be Void.—See notes to sections 185 and 194.

Costs of
garnishee
proceed-
ings.

196. The garnishee shall not be liable for the costs of the proceeding, unless and in so far only as such costs are occasioned by his setting up a defence, which he knew, or ought to have known, was untenable; and, subject to this provision, the costs of all parties shall be in the discretion of the Judge. R.S.O. 1887, c. 51, s. 191.

Costs of the Proceeding.—This is only declaratory: *Bank of Montreal v. Yarrington*, 3 U.C.L.J. 185. If it becomes necessary to issue execution against the garnishee, he becomes liable for the costs of it, and the bailiff's fees thereon: Rule 84. The costs of all notices required to be given under section 193 shall be costs in the cause, but in no case shall be payable by the garnishee unless specially ordered by the judge: section 193; Rule 86 (g).

If the money sought to be garnished is paid into court and not accepted by the primary creditor the judge is to determine as to the party by whom the costs of the action, or any part thereof, shall be paid, and make such order as may be in accordance with such determination: Rule 80 (b).

Ought to Have Known was Untenable.—Each case must depend on its own circumstances. The reasonableness of any defence set up by the garnishee is to be determined by the judge, and if in his opinion the defence is such as a reasonable-minded man and one of ordinary intelligence should not have set up, costs would be imposed: see *Maxwell on Statutes*, 101, 104.

Costs of
primary
creditor.

197. The Judge in any case brought to garnish a debt, may, in giving judgment on behalf of the primary creditor award the costs of the proceeding to the primary creditor out of the amount found due from the garnishee to the primary debtor. R.S.O. 1887, c. 51, s. 192.

In Any Case Brought to Garnishee a Debt.—See notes to section 179.

Award the Costs of the Proceedings.—Before the year 1880, the judge had no power to award more than the primary creditor's claim out of the amount found due from the garnishee to the primary debtor.

Now, if there be enough in the hands of the garnishee to pay the costs, it may be ordered to be applied in that way.

Summons
and memo-
randum of
particulars
to be filed.

198. Judgment shall not be given either against the primary debtor or the garnishee until the said summons and memorandum, with an affidavit of the due service of both on the proper parties, are filed, unless the Judge for special reasons orders otherwise. R.S.O. 1887, c. 51, s. 193.

Affidavit of Service.—The affidavit should be entitled in the court and cause and be according to Rules 262-268; see notes to section 115; see Forms 28, 44, 74, 75. It should show that both the garnishee and primary debtor were served and how: see Rule 74, and notes to sections 103, 184, 188, and 191.

Otherwise Orders.—This provision is probably made in order to provide for a case in which loss of papers or other accidents may prevent proof of service in the ordinary way: see *Wolf v. Koch*, 34 C.L.J. 95.

199. No execution shall in any case issue to levy money owing from a garnishee until and so far only as such money has become fully due. R.S.O. 1887, c. 51, s. 194.

No execution till garnishee's debt due.

Money Has Become Fully Due.—Independently of this section, the order would not have been granted otherwise: *Tapp v. Jones*, L.R. 10 Q.B. 591; notes to section 179.

200. Any party entitled to or interested in any money or debt attached or bound in the hands of the garnishee by a proceeding under this Act, may, at any time before actual payment thereof by the garnishee, apply to the Judge for an order (which the Judge is hereby authorized to make), to the effect that such money or debt be discharged from the claim of the primary creditor; and thenceforth such money or debt shall cease to be attached or bound for such claim; and such an application and such an order may also be made, if the Judge thinks fit, after the money or debt has been paid over by the garnishee, in which case all parties shall be remitted to their original rights in respect thereto, except as against the garnishee having already paid the debt or money, whose payment shall not be affected thereby, but shall be and remain an effectual discharge to him. R.S.O. 1887, c. 51, s. 195.

Application to discharge debt from attachment.

Any Party Entitled to or Interested In.—The language of this section is very wide. Should there be several garnishments against the same fund, a second garnishee would have the right to apply under this section to discharge the fund from a previous garnishment proceeding.

An assignee of the debt would also have that right. In fact, any person who made any claim to the money or debt garnished, could take the benefit of this section.

An order could be made even after the money or debt had been paid over by the garnishee, and the parties could be remitted to their original rights in respect of it, except as against the garnishee who had *bona fide* paid the money in pursuance of the garnishment proceeding.

It is submitted that the party applying could take advantage only of substantial objections to the attachability of the debt as against him under the garnishment proceedings which it is sought to set aside. He could not rely upon mere irregularities: *Maedonald v. Crombie*, 2 O.R. 243; 10 A.R. 92; 11 S.C.R. 107; *Archbold's Prac.* 13th ed. 1193; but "defences" even though of a kind which would, in other cases, be personal to the primary debtor or garnishee, may be set up under section 193. An order for payment may be rescinded if it appears that the debt was assigned prior to the garnishment: see *Beaty v. Hackett*, 14 P.R. 395; *Moore v. Peachy*, 66 L.T. 198; see notes to section 179, *ante* p. 328.

At Any Time Before Actual Payment.—"I see no reason why a payment in goods may not be as good as a payment in money;" *per Bolland, B.*, in *Cannan v. Wood*, 2 M. & W. 470. "It may be in money or money's worth:" *per Parke, B.*, at p. 469. See also *Wilkins v. Casey*, 7 T.R. 713; *Truax v. Dixon*, 17 O.R. 366. Or a bank draft: *Caine v. Coulton*, 1 H. & C. 764. Or cheque: *Hopkins v. Ware*, L.R. 4 Ex. 268; *Norman v. Ricketts*, 21 Sol. J. 124. Or by the mere transfer of figures in an

account, without any money passing: *Eyles v. Ellis*, 4 Bing. 112; *Bodenham v. Purchas*, 2 B. & Ald. 39; *Beatty v. Maxwell*, 1 P.R. 85; *Nightingale v. Bank of Montreal*, 26 C.P. 74; *Hills v. Mesnard*, 10 Q.B. 266. Or by payment to a third person: *Waller v. Andrews*, 3 M. & W. 312; *Bramston v. Robins*, 4 Bing. 11; or by accepting an order: *Jennings v. Willis*, 22 O.R. 439. But a tender is not payment: *Bank of New South Wales v. O'Connor*, 14 App. Cas. 273. Nor is the mere deduction of an amount from moneys in hand: *Re West, Ex parte Clough*, (1892) 2 Q.B. 102.

Apply to the Judge for an Order.—The application must be made upon written notice of motion or by summons obtained from the judge, returnable at any time and place the judge may appoint, and calling upon the garnishee, primary creditor or such other person or persons as the judge in his discretion, shall think fit. If the money has been paid over the primary creditor or other person may be called upon by the notice of motion to show cause why he should not pay the money to the primary debtor or other person applying: Rule 81.

Order of Payment.—The judge is only authorized to make an order discharging the debt from the claim of the primary creditor. But for the rule, if the money had been paid to the creditor, there was no power to enforce restitution except by a new action by the owner against the primary creditor: see *Wood v. Dunn*, L.R. 2 Q.B. 73; *Andrew v. Canadian Mutual L. & Inv. Co.*, 29 O.R. 365.

An Effectual Discharge to Him.—See notes to section 193.

A refusal by the judge to grant an order to discharge the debt under this section is a matter within his jurisdiction and prohibition will not lie in such a case: *Re Dyer v. Evans*, 30 O.R. 637, and cases cited *ante* p. 66.

Security
from
primary
creditor.

201.—(1) If the Judge, on the hearing of a summons under this Act, or on special application for the purpose, thinks proper, he may, before giving judgment against the garnishee, or at any time before actual payment by the garnishee, order such security to be given as may be approved by himself or the Clerk, by or on behalf of the primary creditor, for the repayment into Court to abide the Judge's order, in case a Judge's order is made for repayment.

(2) The bond shall be to the Clerk by his name of office, and shall enure for the benefit of all parties interested in or entitled to the money, and may by order of the Judge, and on such terms as to indemnity against costs and otherwise as he may impose, be sued in the name of the Clerk of the Court for the time being, for the benefit of the party entitled. R.S.O. 1887, c. 51, s. 196.

Security May be Ordered.—This provision is made for the protection of the garnishee or other person in doubtful cases. It sometimes happens that the rights of the parties may have to be settled by appeal: *Victoria M. F. Ins. Co. v. Bethune*, 1 A.R. 423; or upon interpleader proceedings: *Re Anderson v. Barber*, 13 P.R. 21; and a judge could, by exercising his powers under this section, while obtaining the money from the garnishee, and thus protecting the creditors and the debtor, require security for the

protection of the garnishee or other parties. The security must be ordered either before judgment against the garnishee or before actual payment by him.

The Bond.—The bond to be given under this section shall be executed by the primary creditor, or his agent, with one or more sufficient securities, and shall be in double the amount of the debt ordered to be paid by the garnishee, and shall be an ordinary bond to the clerk, by his name of office, conditioned for the repayment of the money in case repayment be ordered, and such bond shall be approved by the clerk: Rule 82. If executed by an agent of the primary creditor the agent's authority should be under seal: *Co. Litt. 486; White v. Cuyler, 6 T.R. 176; Berkeley v. Hardy, 5 B. & C. 355.*

The bond may, by order of the judge, be assigned by the clerk to the garnishee, upon its being shown that the condition has been broken by non-compliance with an order for repayment of moneys paid in by a garnishee: Rule 83.

It would seem that the bond may either be issued in the name of the clerk or assigned to the garnishee who could sue in his own name: see notes to section 72 (5), *ante* p. 101. But before a suit can be brought or the bond assigned evidence must be given of the breach of the condition: *Re Young, L.R. 1 P.D. 186*, and an order from the judge obtained.

The action upon the bond if brought in the clerk's name could be sued in the clerk's own division without violating section 92, as he would not be the party suing. The bond being merely for the repayment of money is not within 8 & 9 Wm. III. c. 11, section 8, but is within 4 & 5 Anne c. 16, and a special summons could, therefore, be issued thereon, and payment of the amount before action, though after the time limited by the order, would be an effectual bar to the action: *Murray v. Earl of Stair, 2 B. & C. 82; Gerrard v. Clowes, (1892) 2 Q.B. 11*. For form of bond under this section see Form 76. The form of assignment (Forms 65 and 66) may be changed to suit the circumstances.

302. In case any one other than the primary creditor or primary debtor claims to be entitled to the debt owing from the garnishee, by assignment thereof or otherwise, the Judge, when adjudicating in any of the cases aforesaid, or by calling the proper parties before him by summons for the purpose, may enquire into and decide upon the claim, and may allow or give effect to it, or may hold it void as against the primary creditor for being a fraud upon creditors or otherwise, as the justice of the case may require; and for such purpose he may require the attendance of such parties and witnesses (their conduct money being first paid), as he may think necessary. R.S.O. 1887, c. 51, s. 197.

Case of
adverse
claims.

[(2) The provisions of section 160 and the following sections of this Act relating to juries shall apply and extend to claims to be adjudicated upon under this section so as to give either party a right to require a jury where the amount claimed exceeds \$30]. 62 V. c. 11, s. 10.

Jury.

Adverse Claims.—This is a far reaching provision, and under it a great variety of questions may come within the jurisdiction of a Division Court judge.

His jurisdiction is, however, limited by the amount garnished, and while in adjudicating, he may possibly render a decision which, if correct, will affect property of large value, his decision is effective only, apart from the doctrine of *res adjudicata*, to the extent of settling whether the primary creditor is or is not entitled to receive the debt which has been garnished: *Re Perras v. Keefer*, 22 O.R. 672. For instance, a Division Court judge has power under this section to decide conflicting questions between parties claiming under garnishee proceedings in his court, and parties claiming under an attachment, under the Act respecting Absconding Debtors, from a County Court of another county: *Re Moore v. Wallace*, 13 P.R. 201.

Questions between conflicting assignees, between creditors and assignees, between the debtor and his assignee, between conflicting creditors, between parties claiming as *cestui que trustent*, lien-holders and otherwise might have to be disposed of under this section. Even questions in which the title to land arose might have to be decided: *Munsie v. McKinley*, 15 C.P. 50; *Re Sato v. Hubbard*, 6 A.R. 546; *Cameron v. Allen*, 10 P.R. 192.

Express power is given to decide that a claim (*sic*) is void as being a fraud upon creditors or otherwise. It is submitted, however, that in applying this power, the judge must first find that the debt sought to be attached was once due to the primary debtor, and that the assignment, or other title upon which the adverse claim is founded, is void. No power is given to set aside transactions prior to the creation of the debt, although the debtor would, but for such transactions, have been entitled to the money. For instance, if land be transferred by A., the debtor, to B., and B. sells to C., no purchase money ever becomes due by C. to A. There never was any privity between them, and there is, therefore, no debt: *Vyse v. Brown*, 13 Q.B.D. 199; *Palmer v. Lovett*, 14 P.R. 415; see *O'Donohue v. Hall*, 24 S.C.R. 912.

It is incorrect to speak of a preference as a fraud upon creditors: *Wood v. Dixie*, 7 Q.B. 892; *Holbird v. Anderson*, 5 T.R. 235. But it is submitted that under the words "or otherwise," a judge would have power to decide that a transfer of a debt was void, as a preference, as against the attaching creditor.

Assignment for Benefit of Creditors.—Prior to the time when an assignment for the benefit of creditors was declared to take precedence over all attachments an assignee for the benefit of creditors was not entitled to money which had been garnished, even though no order to pay had been made, notwithstanding section 9 of R.S.O. (1887) c. 124: *Wood v. Joselin*, 18 A.R. 59; *Re Thompson*, 17 P.R. 109, and even now the right of the assignee does not appear to be clear: *Re Dyer v. Evans*, 30 O.R. 637.

The payment of the money into court by the garnishee would not "completely execute the attachment by payment" within R.S.O. c. 147, section 11: *Butler v. Wearing*, 17 Q.B.D. 182; nor would an arrangement that the debt be paid on a certain day, but that in the meantime judgment should be entered but not enforced; *Re Trehearne, Ex parte Enling Local Board*; 63 L.T. 323, affirmed 39 W.R. 116, but if the bailiff secures the money on an execution against the garnishee the attachment is completely executed by payment; *Clarkson v. Severs*, 17 O.R. 592.

Absconding Debtor.—An attachment issued to the sheriff against the primary debtor, as an absconding debtor, entitles the sheriff to all money in court the proceeds of an attachment: R.S.O. c. 79, s. 7; *Re Moore v. Wallace*, 13 P.R. 201.

Mechanics' Lien.—Whether a Mechanics' Lien of a sub-contractor takes priority over a garnishee summons against the fund in the hands of the owner, for a debt due by the contractor, is a question of some doubt. There is no reported Canadian decision on the question. It is submitted that the lien exists from the commencement of the work under sections 4 and 22 R.S.O. c. 153, and that the registration of the statement of claim, under section 17, is merely to preserve the lien. That being the case, the lien, when duly registered, dates from the commencement of the work by the sub-contractor, and nothing short of a payment to the contractor without notice of the lien of the sub-contractor, will prevent the lien from being effective: see section 9. The attaching creditor is not a purchaser for value: *Dallow v. Garrold*, 14 Q.B.D. 543, but merely takes what the debtor (the contractor) could himself honestly deal with: *Davis v. Freethy*, 24 Q.B.D. 519; *Beaty v. Hackett*, 14 P.R. 395, and cases cited in note to section 179, *ante* p. 328. As all lien holders of the same class are entitled to rank *pari passu*, one of them would not be able to acquire priority by garnishee proceedings: *Kennett v. Westminster Improvement Commrs.*, 11 Ex. 349.

Creditors' Relief Act.—By the Creditors' Relief Act, R.S.O. c. 78 s. 37, it is provided:—

(1) Where there are in the sheriff's hands several executions and claims, and there are not, or do not appear to be, sufficient lands or goods, as the case may be, to pay all and his own fees, he may apply for an order attaching any debt owing to the execution debtor by any person resident in the county of such sheriff, whether the debt is owing by such person alone or jointly with another person resident or not resident in such county, and to procure the attachment the sheriff may take the same proceedings as a creditor: and in such case a writ of execution, or other writ in the course of the proceedings, may be directed to him in the same manner as if the attachment were by a creditor; and the proceeds of the debts attached shall be distributed in the same manner as if he had realized the same under execution.

(2) In case the sheriff does not take such proceedings, any person entitled to distribution may take the same for the benefit of himself and all other persons entitled to the distribution as aforesaid, and the person owing the attached debt and shall pay the same to the sheriff.

(3) Any judgment creditor who attaches a debt shall be deemed to do so for the benefit of himself and all creditors entitled under this Act; payment of such debt shall be made to the sheriff, who in making distribution will apportion to such judgment creditor a share *pro rata*, according to the amount owing upon his judgment, of the whole amount to be distributed under the provisions of this Act, but such share shall not exceed the amount recovered by the garnishee proceedings unless the judgment creditor has placed a writ in the sheriff's hands.

(4) Money garnished and paid into the sheriff's hands shall be deemed to be money levied under execution, within the meaning of this Act, except that, unless the garnishee proceedings were taken by him, the sheriff shall only be entitled to charge poundage on such moneys at the rate of one and a quarter per cent.

(5) The provisions of sub-sections 3 and 4 of this section shall also apply, as nearly as may be, to any person who attaches a debt in the Division Court before judgment, and to the money so attached.

(6) In case a garnishee, under an order of the court, pays to the attaching creditor, or in case a garnishee, without notice that the sheriff is entitled, pays the amount of his debt into court and the same is paid out to the said creditor, the sheriff may recover from him the amount so received: R.S.O. 1887, c. 65, s. 37.

It seems clear that these provisions cannot be operative, unless The Creditor's Relief Act has been brought into play either by a levy by the sheriff and an entry thereof in his book or by a garnishment by him where there are several executions in his hands. There are, however, various conditions of facts which create difficulty.

If, prior to the levy of the money by the sheriff, the attachment proceedings have been completed by the judgment against the garnishee and by payment by him to the attaching creditor, the sheriff would have no right to recover the money. If he paid it into court, and it was paid out before such levy, the rights would be the same: see *Re United English and Scottish Assurance Co., Ex parte Hawkins*, L.R. 3 Ch. 787. If, however, it had not been paid out, but was in court at the time the Creditors Relief Act became operative, it could not be said that the right of the attaching creditor to receive the money was at all clear. The judgment against the garnishee did not cause him to be a debtor of the attaching creditor, or to cease to be a debtor of the primary debtor: see *Re Combined Weighing and Advertising Machine Co.*, 43 Ch. D. 99. The debt, therefore, was still, at the time of the levy, the property of the primary debtor, bound only by the garnishment. The companion section 7 of the Absconding Debtor's Act, requires money in court, the proceeds of garnishment proceedings, to be paid to the sheriff for distribution: *Re Moore v. Wallace*, 13 P.R. 201; and the intention of the legislature would appear to have been the same with regard to both classes of cases, although in such case, the provisions seem somewhat lar and ambiguous. Full effect can, perhaps, be given to the language of the section by holding that it is applicable to garnishment proceedings which are commenced after the levy and pending the distribution. To this effect was the decision in *Traders Bank v. McConnell*, 24 C.L.J. 87, wherein *McDougall, Co. J.*, held, that sub-section 3 above, applied only to "cases within the Act, or in other words, when the Act, by the entry of the sheriff, has been brought into operation." This decision was, however, founded upon the view that the garnishee summons was an effectual transfer of the debt, following *Ex parte Joselyne*, 8 Ch. D. 327, but overlooking *Chatterton v. Watney*, 17 Ch. D. 259; and that part of the reasoning is clearly unsound: *Re Combined Weighing and Advertising Machine Co.*, 43 Ch. D. 99. But if the money had ceased to be the property of the debtor at the time the Creditors Relief Act became operative, section 37 has no application: *Re Thompson*, 17 P.R. 109.

Until payment is made, the money remains simply bound by the attachment in the same manner as goods are bound by an execution in the sheriff's hands. It may well be urged that full effect can only be given to the language of the Act by holding that all garnishment proceedings against debtors resident in the bailiwick of the sheriff, which had not been completed by actual payment, before levy by the sheriff under the Act, are affected by the provisions here set out, and that payment must be made by the garnishee to the sheriff. The sheriff does not take adversely to, but under the garnishment proceedings. But in *Re Thompson*, 17 P.R. 109, the court was inclined to the view that the benefit of sub-section 3 of section 37 was confined to creditors having executions in the sheriff's hands at the time of the attachment of the debt.

Care should be taken, in this event, to have the costs of the proceeding awarded out of the amount found due by the garnishee: see section 197, as otherwise the primary creditor would have to bear the costs while the other creditors would profit by his efforts: see remarks in *Wood v. Joselin*, 18 A.R. 59.

It will be observed, that the sheriff has no right to take attachment proceedings against persons not resident in his county: *Re Thompson*, 17 P.R. 109. Sub-section 2 evidently refers to debts owing which might have been attached by the sheriff, but sub-section 3 is not clear upon this

point. As the payment is to be made to the sheriff, it is submitted, that it is to the sheriff of the county in which the garnishee resides, and only when that sheriff has brought the debt within the Act by having made a levy.

Adjudication on Claims.—If all parties who are suggested, or who appear to have any interest in the debt, are before the court at the original hearing, the judge may adjudicate upon the rights of the third parties at that time. If any party is not before the court it will be necessary for a summons to issue to bring him before the court. Wherever in a proceeding to obtain an attachment of debts, it is claimed that the debt sought to be attached belongs to some third person or that any third person has a lien or charge upon it the judge may order such third person to appear and state the nature and particulars of his claim upon such debt, and after hearing the allegations of such third person and of any other person who by the same or any subsequent order is ordered to appear, or in case of such third person not appearing when ordered, the judge may give such decision between all the parties as he shall consider just, and may bar the claim of such third person, either in whole or in part, or make such other order, as such judge shall think fit, upon such terms in all cases, with respect to the lien or charge (if any) of such third person, and as to costs, as the judges shall think just and reasonable: Rule 77.

Where a debtor is being harassed by garnishment proceedings, and also by other conflicting claims, he may move for an interpleader order: R.S.O. c. 51, s. 57, s-s. 6; *Reading v. School Board of London*, 16 Q.B.D. 181; *McElheran v. London Masonic Ben. Assn.*, 11 P.R. 181.

The proper practice in such a case is for the applicant to move in the court in which he has been sued: C.R. 1103; *Re Anderson and Barber*, 13 P.R. 21; see *Re Gould v. Hope*, 21 O.R. 624; 20 A.R. 347.

For forms of judgment and memorandum of proceedings hereunder, see Forms 95 and 96.

Right to Jury.—The provision of section 160, and subsequent sections respecting trial by jury in Division Courts are made applicable to the trial of claims to be adjudicated upon under this section. See sections 160 to 178, *ante* pp. 306-320, and notes thereto.

203. The Judge may postpone or adjourn from time to time, the hearing and other proceedings in garnishee cases, to allow time for giving omitted notices of defence, or to produce further evidence, or for any other purpose; and may require service on, and notice to, other or additional parties, and may prescribe and devise forms for any proceeding, and may amend all summonses, memoranda, claims, accounts, notices and other papers and proceedings, and copies thereof as justice may require. R.S.O. 1887, c. 51, s. 198.

Judge may
postpone or
adjourn
proceed-
ings.

From Time to Time.—As often as he pleases: *Nelson v. Jarvis*, 13 C.P. 176; *Re Sutton Coldfield Gram. School*, 7 App. Cas. 91; *Whitehouse v. Wolverhampton Ry. Co.*, L.R. 5 Ex. 6.

The judge has, in Division Court proceedings, generally full powers in regard to adjournment and amendment; but in these garnishee cases more than ordinary discretion is conferred by this section, even to the granting of new trials after the expiration of 14 days if justice requires it: *McLean v. McLeod*, 5 P.R. 467; followed in *Hobson v. Shannon*, 26 O.R. 554, 27 O.R. 115.

See notes to section 98, *ante* p. 155, and to section 112, *ante* p. 183, as to powers of amendment, and notes to section 124, *ante* p. 213, as to adjournment.

Debt
attachment
book.

204. The Clerks of the several Division Courts shall keep in their respective offices a debt attachment book, according to the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts, in which shall be correctly entered the names of parties, the dates, statements, amounts and other proceedings under this Act, as indicated by the said form; and copies of any entries made therein may be taken by any one on application free of charge. R.S.O. 1887, c. 51, s. 199.

Debt Attachment Book.—See Rule 146; notes to section 63, *ante* p. 52. When the attaching order or garnishee summons issues, the clerk must forthwith make an entry thereof in the Debt Attachment Book, and so from time to time make an entry of each subsequent proceeding as soon as taken: Rule 85. See Form 5.

Correctly Entered.—The names of all parties and other particulars should be entered exactly as in the suit.

Copies of Entries.—Upon proof that a copy of any entry was an examined copy or extract, or that it purported to be signed and certified as a true copy or extract by the clerk, it would be receivable in evidence: R.S.O. c. 73, s. 29; compare section 45, *ante* p. 35.

Garnishment of Small Debts in High Court.—In proceedings against garnishees under the consolidated rules of practice of the Supreme Court of Judicature for Ontario, Rule 918, the Forms 173*b* and 152 may be used; and the same proceedings may be taken in the Division Court against the garnishee as provided in The Division Courts' Act, and in these rules and forms so far as applicable: Rule 87.

C.R. 918 is as follows:

918.—(1) Where the debt claimed to be due or accruing from a garnishee is of the amount recoverable in a Division Court, the order to appear, made under Rule 911, shall be for the garnishee to appear before the Clerk of the Division Court within whose Division the garnishee resides, at his office, at a day to be appointed in writing by such Clerk, and the order shall be served on the garnishee, with written notice of the day appointed by the Clerk.

(2) The Clerk shall report to the Judge whether or not the garnishee appears, and whether he disputes or does not dispute the debt due or claimed to be due from him to the judgment debtor.

(3) If the garnishee does not forthwith pay the amount due by him or an amount equal to the judgment debt, or appears and does not dispute the debt due or claimed to be due from him to the judgment debtor, or if he does not appear before the Division Court Clerk named in the order at his office at the day appointed, the Judge, on the report of the Clerk, and on proof of the service of the order and notice of the appointment having been made two clear days previous, may order payment; and execution, may thereupon be issued out of the Division Court of the Division in which the garnishee resides.

(4) If the garnishee disputes his liability, the Judge may order that the judgment creditor shall be at liberty to proceed against the garnishee,

according to the practice of the Division Court, for the alleged debt or for the amount due to the judgment debtor if less than the judgment debt, and for costs.

C.R. 919 is as follows:

919.—In County Court cases the power conferred by Rules 917 and 918 may be exercised by the Judge although the garnishee does not reside within his county.

Service of Order.—The order must be served two clear days (see notes to section 91, *ante* p. 140) before the time appointed in the order.

Proceedings Before Clerk.—The clerk should endorse on the order issued out of the High Court, or any County Court, a memorandum either of non-attendance, admission, or denial. If the garnishee either admit or deny the debt, the clerk should endorse such admission or denial upon the order and obtain the signature of the garnishee thereto. If the garnishee admits the debt, or does not attend, an order is to be obtained from the judge for payment; and execution may then be issued thereon in the Division Court. No proof of the debt by the garnishee is necessary: *Vinall v. De Pass*, (1892) A.C. 90; *Coren v. Barne*, 22 Q.B.D. 249; *De Pass v. Capital and Industries Cor.*, (1891) 1 Q.B. 216.

Payment by Garnishee.—The garnishee should not pay the debt until the order for payment is made, unless he pays it into court: see Rule 79; notes to section 184. The payment in such case would be made into the court from which the order issued.

Denial by Garnishee.—If the garnishee denies the debt, an order would have to be made that the creditor should be at liberty to proceed against the garnishee in the Division Court, and it would then be necessary for the judgment creditor to issue a summons under section 186. Form 70 may be used but the heading thereof should be altered to read as follows:

In the Division Court of the County of . In the matter of the suit in the High Court of Justice for Ontario (or County Court of the County of as the case may be.)

Between	}	Judgment recovered on the
A.B.		day of 19 in the
Plaintiff		High Court of Justice for Ontario
C.D.		Division (or in the
Defendant	}	County Court of the County of
and E.F.		as the case may be)
Garnishee		Amount unsatisfied \$

Costs of Suit.—The garnishee may be ordered to pay the costs of suit occasioned by his denial. See C.R. 917 and 918. See also section 196 and Rule 80.

NOTICE WHERE JURISDICTION DISPUTED.

205. In all cases where a defendant, primary debtor or garnishee intends to contest the jurisdiction of a Division Court to hear or determine any cause, matter or thing in such court, he shall leave with the Clerk of the Court, within eight days after the day of service of the summons on him (where the service is required to be ten days before the return), or within twelve days after the day of such service (where the service is required to be fifteen or twenty days before the

Notice where jurisdiction of court disputed to be given.

return), a notice to the effect that he disputes the jurisdiction of the Court, and the Clerk shall forthwith give notice thereof to the plaintiff, or primary creditor, or his Solicitors or agents in the same way as notice of defence is now given, and in default of such notice disputing the jurisdiction of the Court, the same shall be considered as established and determined, and all proceedings may thereafter be taken as fully and effectually as if the said action or proceeding had been properly commenced, entered or taken in such Court; and the notice shall be in writing; and prohibition to a Division Court shall not lie in such action from any Court whatever, where the notice disputing the jurisdiction has not been duly given as aforesaid. R.S.O. 1887, c. 51, s. 176.

Notice Disputing Jurisdiction.—This notice is an indispensable requisite to a proceeding founded upon the fact that a Division Court had no territorial jurisdiction. A notice once given cannot, apparently, be withdrawn, except by consent of all parties, under section 95; and a notice given by a primary debtor or garnishee would inure to the benefit of all parties. The notice need not be in any particular form. If it expresses the defendant's intention to dispute the jurisdiction, it would be sufficient: see *Harper v. Child*, 1 F. & F. 652; *Lowe v. Owen*, 12 C.P. 101; *Everard v. Watson*, 1 E. & B. at p. 804, *per* Campbell, C.J.; *Paul v. Joel*, 4 H. & N. 355; *Bain v. Gregory*, 14 L.T. 601; *Aldridge v. Medwin*, L.R. 4 C.P. 464; *Allen v. Geddes*, L.R. 5 C.P. 291.

The notice must be in writing: Rule 240; section 97; section 119.

For form of notice see Form 300.

Leave with the Clerk.—See notes to section 113, sub-section 1.

Within Eight Days.—See notes to section 113, *ante* p. 285. The time for giving notice cannot be extended; notes to section 152; nor abridged: *Hamilton P. & L. Soey. v. McKim*, 13 P.R. 125. And the judge cannot after the expiration of the time limited by the statute grant leave to file the notice: *Re McLean v. Osgoode*, 30 O.R. 430.

Forthwith.—See notes to section 24, *ante* p. 19. As to the requirements of this notice see section 97, *ante* p. 153; notes to sections 118 and 119, *ante* pp. 206, 207. The defendant is also required to leave his address, or that of his solicitor or agent, with the clerk: Rule 241.

Disputing the Jurisdiction of the Court.—Statutes relating to the practice and procedure of a court only apply to matters within its jurisdiction: *Ahiens v. McGillegat*, 23 C.P. 171.

The necessity of a notice disputing the jurisdiction only arises where the cause is one triable in *some* Division Court. If it is beyond the jurisdiction of *any* Division Court and is only suable in some *higher* court no notice need be given: *Mead v. Creary*, 8 P.R. 374; 32 C.P. 1; *Manufacturers and Merchants M.F. Ins. Co. v. Campbell*, 1 C.L.T. 134; *Re Knight v. Medora*, 14 A.R. 112; *Graham v. Tomlinson*, 12 P.R. 367. See notes to section 87, *ante* p. 139. Should it be impossible for a party to leave with the clerk a notice disputing the jurisdiction owing to his absence or a like cause, the party would not be debarred of his right: see notes to section 90, sub-section 3, *ante* pp. 143, 144. And if the clerk omitted to give the notice required neither party's rights in the suit would be prejudiced by it. Should the clerk refuse to perform any part of his duty in regard to such notice its performance could be enforced by

mandamus: notes to section 70, title "Mandamus." And the omission by the clerk to do so would render him liable for any damage either party could prove he had sustained, in consequence of such default: *Parks v. Davis*, 10 C.P. 229; *Henly v. Mayor of Lyme-Regis*, 5 Bing. 108; *Ferguson v. Earl of Kinnoul*, 9 Cl. & F. 251; *Rogers v. Dutt*, 13 Moo. P.C. 209; *Carey v. Lawless*, 13 U.C.R. 285. An action would also be maintainable against his sureties on their statutory covenant: *Nerlich v. Mallory*, 4 A.R. 430; notes to section 36, *ante* pp. 25, 26.

Prohibition Shall Not Lie.—The words used here were introduced to neutralize the effect of *Clarke v. Macdonald*, 4 O.R. 310, which was founded on the English case of *Oram v. Breary*, 2 Ex. D. 347, which case was overruled by *Chadwick v. Ball*, 14 Q.B.D. 855.

ARBITRATION.

206. The Judge may, in any case, with the consent of both parties to the action, or of their agents, order the same, with or without other matters in dispute between such parties, being within the jurisdiction of the Court, to be referred to the arbitration of such person or persons, and in such manner and on such terms as he thinks reasonable and just; or the parties to an action, may by writing, signed by themselves or their agents, agree to refer the matters in dispute to the arbitrament of a person named in the agreement, which shall be filed with the Clerk, and be entered on the Procedure Book as notices are entered. R.S.O. 1887, c. 51, s. 200.

Reference to arbitration by order of Judge or by consent.

Arbitration.—Parties cannot be compelled to arbitrate. When the judge orders the arbitration the consent of the parties or their agents need not be in writing, and in this case, also, the reference may include matters not covered by the action itself, so long as the jurisdiction of the court is not exceeded. The judge may impose terms, and may, therefore, limit the time within which the award may be made.

If one of the parties should be a corporation, and no order be applied for, the consent might be either under the corporate seal or the hand of its agent. If a solicitor consented on behalf of the corporation, his retainer need not be under seal: *Faveiell v. Eastern Counties Ry. Co.*, 2 Ex. 344. Counsel has power to consent: *Wilson v. Corp. of Huron and Bruce*, 11 C.P. 548, even against the wish of his client, unless his dissent is communicated to the opposite party: *Strauss v. Francis*, L.R. 1 Q.B. 379.

Trustees and executors may submit to arbitration; R.S.O. c. 129, section 33.

If an action of replevin be referred without the consent of the sureties, they will be discharged: *Burke v. Glover*, 21 U.C.R. 294.

The better opinion is, that idiots, lunatics, infants, married women, persons attainted and excommunicated may be arbitrators, if agreed to by the parties: *Russell*, 111.

The parties on the record, though they are merely nominal parties, must consent: *Owen v. Hurd*, 2 T.R. 643. Where a third party, who had agreed to join in a submission of a suit, refused to proceed in the reference, the submission was set aside on the application of one of the parties on the record: *Bacon v. Creswell*, 1 *Hodges*, 180.

When nothing is said about costs, the arbitrator has implied authority to adjudicate respecting the costs of the cause, but not of the reference or award: Russell 377; *Re Harding and Wren*, 4 O.R. 605; but see *Macdonell v. Baird*, 13 P.R. 331, wherein it was held that the arbitrator had no power in such cases over costs. But if there be an express power given to the arbitrator over costs, and a *fortiori* over the costs of the reference, the arbitrator may deal with the costs of the reference and award: Russell. 377.

If the costs are to abide the event, the arbitrator cannot make any disposition of them: *Devanney v. Dorr*, 4 O.R. 206; see *Hawke v. Brear*, 14 Q.B.D. 841.

The arbitrator need not, unless he please, give any direction respecting costs. The costs of the action, at least, will then abide the event: Russell, 383; *Munster v. Cox*, 10 App. Cas. 684.

An arbitration is a judicial inquiry to be conducted upon the ordinary principles upon which judicial inquiries are conducted, by hearing the parties and the evidence of their witnesses: *Re Hopper*, L.R. 2 Q.B. 373.

The arbitrator should decline to receive private communications from either litigant respecting the subject matter of the reference. It is a prudent course to make a rule of handing over to the opponent all written statements sent to him by a party, and to take care that no kind of communication concerning the points under discussion be made to him without giving information of it to the other side: Russell, 654; see *Connec v. The C.P. Ry. Co.*, 16 O.R. 639, 654; *Re Trythall*, 5 B.C.R. 50; *Wood v. Gold*, 3 B.C.R. 281.

No witness should be examined, except in the presence of both parties: Russell, 191-195; *Cruickshank v. Corbey*, 5 A.R. 415; *Whiteley v. MacMahan*, 32 C.P. 453; *Race v. Anderson*, 14 A.R. 213; *Re Ferris & Eyre*, 18 O.R. 395.

Parties may, however, waive the irregularity by not objecting, or by attending, without objection, meetings held after knowledge of the irregularity: Russell, 196.

The arbitrator may proceed *ex parte* if he have given notice of his intention so to do, in the event of either party not attending. Making an appointment "peremptory," is sufficient: Russell, 198.

An arbitrator is not bound by the rules of evidence, and his failure to observe them is no ground for setting aside the award: Russell, 199-201; *Webster v. Haggart*, 9 O.R. 27; *Lemay v. McRae*, 16 O.R. 307; 16 A.R. 348; 18 S.C.R. 280; *Re Keighley, Maxstead & Co.*, and *Bryan, Durant & Co.*, 9 T.L.R. 107.

It will be noticed that when the arbitration is directed by order of the judge, that more than one person may be appointed. But when the arbitration is to be carried on merely under a written consent filed with the clerk, only one arbitrator is contemplated. There does not appear to be room, in either case, for the choice of an umpire or other arbitrator; but see Form 182.

The arbitrator must be named in the order or consent.

Where more than one arbitrator is appointed, all must concur in the award, or have an opportunity of concurring. Those who are to be affected by it have a right to the united judgment of all up to the very last moment.

The fact of a joint execution by two, although good if the third finally refused to join (*Freeman v. Ontario & Quebec Ry. Co.*, 20 C.L.J. 329), cannot make good an award designed for the three and executed separately by the third, both of the others not being present and joining with him: *Nott v. Nott*, 5 O.R. 283; Russell, 249. Where the submission

provides that the award thereunder shall be made by three arbitrators, the award to be valid must be made by the three arbitrators unanimously: *Re O'Connor and Fielder*, 25 O.R. 568.

207. The reference shall not be revocable by either party except with the consent of the Judge. R.S.O. 1887, c. 51, s. 201. Revocation of reference.

Revocation of Award.—The High Court has power to prevent an incompetent arbitrator from acting without waiting until the award is made, and a solicitor who had acted as counsel for one of the parties was restrained from acting: *Township of Burford v. Chambers*, 25 O.R. 663.

Leave was given to revoke a submission, where an arbitrator was going wrong in a point of law, even in a matter within his jurisdiction: *East and West India Dock Co. v. Kirk*, 12 App. Cas. 738. That case was, however, one of a very exceptional character, and lays down no general rule. The power to grant leave to revoke is a matter of discretion: *James v. James*, 22 Q.B.D. 669; 23 Q.B.D. 12. A submission to arbitration will not be revoked on a question of the admission or rejection of evidence unless a miscarriage of justice is involved. If the arbitrators have acted *bona fide* and reasonably in the matter the court will not interfere: *Re Small and St. Lawrence Foundry Co.*, 23 O.R. 543.

If an arbitrator has received evidence behind the back of a party, leave to revoke would be granted: *Russell*, 159, 160.

Where an arbitrator has wrongly rejected admissible evidence, the court will not give leave to revoke, if satisfied that the arbitrator will, on hearing the opinion of the court, receive the evidence: *Robinson v. Davies*, 5 Q.B.D. 26.

Where new circumstances has arisen since the submission, of such a kind as to make it probable that the arbitrator would have a bias, the discretion of the court will be exercised: *Re Baring & Doulton*, 8 T.L.R. 701; *Connec v. C.P. Ry. Co.*, 16 O.R. 639. The arbitrator must have an open mind: *Jackson v. Barry Ry. Co.*, 9 T.L.R. 90; *Sherwood v. Balch*, 30 O.R. 1; *Good v. Toronto, Hamilton & Buffalo Ry. Co.*, 26 A.R. 133; affirmed by Supreme Court, 36 C.L.J. 123.

Death of one of the parties, before award, revokes the submission: *Tyler v. Jones*, 3 B. & C. 144; unless the submission provides the contrary: *McDougal v. Robertson*, 4 Bing. 435; *Re Curry*, 12 P.R. 437; but the death of one of several parties on the same side, where interests are identical, will not revoke the submission: *Re Hare & Milne*, 6 Bing. N.C. 158; but where their interests are separate, it will be revoked as to the deceased: *Russell*, 168; *Re Potter & Knapp*, 6 C.L.J. 125; *Re Lawson v. Hutchinson*, 19 Gr. 84.

A probability that the arbitrators will give more than one party considers right, is no ground for revocation: *G.W. Ry. Co. v. Miller*, 12 U.C.R. 654. But if they are about to allow improper charges, application may be made for leave to revoke: *Carveth v. Fortune*, 12 C.P. 504.

A submission cannot be revoked, except by consent, after award made: *Phipps v. Ingram*, 3 Dowl. 669; *Lemay v. McRae*, 16 O.R. 307; 16 A.R. 348; 18 S.C.R. 280; see section 209, *infra* and notes.

208. The award of the arbitrator or arbitrators or umpire shall be entered as the judgment in the cause, and shall be as binding and effectual as if given by the Judge. R.S.O. 1887, c. 51, s. 202. Award to be entered as the judgment.

The award must be made within the time limited by the order or consent, otherwise the authority of the arbitrator would be gone; *Denton v. Strong*, L.R. 9 Q.B. 117. Power might, however, be given to the arbitrator to enlarge the time, or the lapse of time might be waived by appearing on the arbitration without objection: *Thurlow v. Sidney*, 29 Gr. 497.

If no power existed to enlarge the time, and the objection was not waived, the action would still remain untried, and the court could either try it or, on consent, direct a new arbitration. When power is given to enlarge the time, the enlargement should be made during the original period, unless a special power be given to enlarge afterwards: *Russell*, 143. The court would have no power, without consent, to enlarge the time: *Russell*, 149. The High Court has power to enlarge the time for making an award under a voluntary submission by virtue of R.S.O. c. 62 s. 10, even after the time for making the award: *Re Clement and Dixon*, 17 P.R. 455; but this provision is not applicable to arbitrations under section 206.

An arbitrator cannot be compelled to make an award: *Russell*, 203. The arbitrator may consult men of science in every department where it becomes necessary: *Caledonian Ry. Co. v. Lockhart*, 3 Marq. 808. A valuer may be consulted: *Emery v. Wase*, 5 Ves. 846; *Gray v. Wilson*, L.R. 1 C.P. 50; or a solicitor: *Proctor v. Williams*, 8 C.B.N.S. 386; or an accountant: *Re Tidswell*, 33 Beav. 213.

Any writing containing words expressing a decision is an award. There need be no recitals: *Russell*, 246. It must finally decide all matters in difference in the suit. Any sum found to be due may be ordered to be paid by instalments, and in default of payment of one, the whole may be ordered to become due. The arbitrator cannot delegate his authority to another, nor reserve any future power to himself. Nor can he order an act to be done to the satisfaction of another. But a mere ministerial act may be reserved to be done by himself or a stranger, *e.g.*, to make measurements or to settle the form of a bond or release: *Russell*, 281.

The award must be certain, so that no reasonable doubt can arise upon the face of it as to the arbitrator's meaning, or as to the nature and extent of the duties imposed by it on the parties: *Russell*, 206; *Mitchell v. G.W. Ry. Co.*, 38 U.C.R. 471.

It is said that a direction to pay the costs of an inferior court, without ascertaining the amount, is void for uncertainty: *Addison v. Gray*, 2 Wils. 293; *Winter v. Garlick*, 1 Salk. 75. But if the direction should be to pay the costs taxed by the clerk of the Division Court, it would probably be good: *Higgins v. Willes*, 3 M. & R. 382; *Hopcraft v. Hickman*, 2 S. & S. 130; see *Re Preble and Robinson*, (1892) 2 Q.B. 602.

The award must be mutual, *i.e.*, if payment is directed to be made by the one party, it must destroy his obligation to the other: *Russell*, 296.

It must be possible, intelligible and consistent.

An affidavit of execution must accompany it: Rule 126.

The arbitrator may retain the award until his fees are paid: *Russell*, 251. The amount of fees is regulated by R.S.O. c. 62, sections 19 to 27; schedules B. and C., R.S.O. p. 821.

Travelling expenses of arbitrators cannot be allowed in addition: *Re Hillyard and Royal Ins. Co.*, 12 P.R. 285.

Until taxation of his fees the arbitrator cannot maintain an action therefor: *McKellop v. Logan*, 7 C.L.T. 171; but see *Crampton v. Ridley*, 20 Q.B.D. 48, where a right to sue for fees was held to exist at common law: see R.S.O. c. 62, s. 27.

No action will lie to recover back the fees paid for an invalid award: *Nott v. Gordon*, 20 C.L.J. 379.

An award is valid and binding until set aside although the arbitrators may have misconducted themselves: *Bache v. Billingham*, (1894) 1 Q.B. 107.

Where the costs of the arbitration are not provided for by the submission, each party should pay one-half the arbitrators' fees: *Smith v. Fleming*, 12 P.R. 520, 657; *Re Harding and Wren*, 4 O.R. 605; see R.S.O. c. 62, section 27. The award is as binding and effectual as if given by the judge. It is, therefore, subject to an application for a new trial.

"Publication" of an award, signifying its completion so far as the arbitrator is concerned, is made when he executes it in the presence of a witness or does any other act showing his final mind, upon which he becomes *functus officio*: *Huyek v. Wilson*, 18 P.R. 44.

Costs of an arbitration, if untaxed, do not form a liquidated amount and judgment by default could not be given in a claim for such costs: *Id.*

As to the penalty for attempting to exact excessive fees in a voluntary reference, see R.S.O. c. 62, section 26: *Jones v. Godson*, 23 A.R. 34.

Judgment and Execution.—After an award has been made and with an affidavit of execution thereof is filed with the clerk, unless the judge otherwise orders the clerk shall forthwith enter judgment thereon, and shall at the request of the party entitled thereto, issue execution thereon at such time and in such manner as upon an ordinary judgment of the court: Rule 126. Execution could not be issued until 15 days after the entry of judgment: Rule 125; section 151.

209. The Judge, on application to him within fourteen days after the entry of the award, may, if he thinks fit, set aside the award, or may, with the consent of both parties revoke the reference and order another reference to be made in the manner aforesaid. R.S.O. 1887, c. 51, s. 203.

Judge may
set aside
award.

Setting Aside Award.—By R.S.O. c. 62, s. 27, it is provided that after taxation the arbitrator may maintain an action against all the parties to the reference jointly or severally.

This section gives an extended discretionary power to the judge, and the numerous authorities governing motions to set aside an award are inapplicable except as guides to the judge in exercising his discretion.

The grounds usually urged in moving to set aside an award are: misconduct or corruption on the part of the arbitrator; or the improper reception of evidence behind the back of the parties; or mistake admitted by the arbitrator, or apparent on the face of the award. Where arbitrators heard evidence in the absence of each other and of the witnesses and took matters into consideration outside of question in dispute, the award was held invalidated but referred back to the arbitrators for re-consideration: *Re Trythall*, 5 B.C.R. 50. But see *Kennedy v. Beal*, 29 O.R. 549, where it was held that if an arbitrator had misconducted himself as by hearing evidence behind the back of one of the parties the award must be set aside; see also *Wood v. Gold*, 3 B.C.R. 281.

The award may also be set aside on account of its lacking the requisites enumerated in note to section 208, or for excess of authority by the arbitrator: *Russell*, 652-697.

The fact that an award is contrary to law or evidence, is ordinarily no ground for setting it aside unless a miscarriage of justice is involved. The arbitrator has full power to decide contrary to law or evidence if he

pleases, but if he intends to decide according to law, and makes a mistake, and such mistake is apparent on the face of the award, or is admitted by the arbitrator, the award may be set aside: *Russell*, 303-310; *McRae v. Lemay*, 18 S.C.R. 280.

Under this section the judge may, however, set aside the award, if contrary to law or evidence; or if, in his opinion, it does not do substantial justice, or for any other reason.

The judge may set aside the award on the ground that facts not admissible in a court of law had since been discovered, which might alter the decision: *Re Keighley, Maxstead & Co.*, and *Bryan, Durant & Co.*, 9 T.L.R. 107.

An award made by arbitrators, one of whom was, at the time of the arbitration, a sub-agent or an agent of the defendants in obtaining insurance risks, though he had acted as such to only a very small extent, was held void: *Vineberg v. Guardian Fire and Life Assee. Co.*, 19 A.R. 293; but the fact that one arbitrator had acted as chamber council for the solicitor for one of the parties does not disqualify him: *Re Christie and the Town of Toronto Junction*, 24 O.R. 443; 25 S.C.R. 551. But see *Township of Burford v. Chambers*, 25 O.R. 663.

The time for moving does not expire until 14 days from the entry of the award as a judgment in the cause.

See notes to section 207.

Arbitrators
may also
administer
oaths.

210. Any arbitrator may administer an oath or affirmation to the parties, and to all other persons examined before such arbitrator. R.S.O. 1887, c. 51, s. 204.

It is left to the option of the arbitrator whether he will examine the witnesses on oath or not. He cannot be compelled to so examine them, though one of the parties may require them sworn: *Smith v. Goff*, 3 D. & L. 47.

The sending of adulterated samples to be used on an arbitration, though not in fact so used, is a misdemeanor: *R. v. Vreones*, (1891) 1 Q.B. 360.

For forms of oaths and affirmations to be administered in open court, see Rule 269, and Form 41.

CONFESSIONS OF DEBT.

Clerks and
bailiffs may
take confes-
sions.

211. A Bailiff or Clerk, before or after action commenced, may take a confession or acknowledgment of debt from a debtor or defendant desirous of executing the same, which confession or acknowledgment shall be in writing and witnessed by the Bailiff or Clerk at the time of the taking thereof; and upon the production of the confession or acknowledgment to the Judge, and its being proved by the oath of the Bailiff or Clerk, judgment may be entered thereon. R.S.O. 1887, c. 51, s. 205.

May Take a Confession.—When taken before suit commenced, particulars of claim as full as are required for special summons must be shown by the confession, or attached to it: Rule 102; section 113; Rules 3 and 4.

Where some of the defendants served with a special summons confess and others do not, as to the duty of the clerk, see Rule 118.

And where some served with a special summons do not defend and others do, those not defending are taken to have *confessed* the plaintiff's claim: Rule 117.

If a defendant served with a special summons does not file a disputing notice but gives a confession, the plaintiff can elect to take proceedings on the confession or otherwise: Rule 122; see notes to section 113, *ante* pp. 188, 189.

As to the form of a confession after suit, see Form 229, and for form of affidavit of execution of confession, see Form 32. There is no form of confession before suit, but the above can easily be adapted. One partner cannot give a confession for the firm without special authority: *Huff v. Cameron*, 1 P. R. 255; *Hambidge v. De La Crouée*, 3 C. B. 742; but if the non-executing partner comes to know of it, and allows proceedings to be taken upon it, and delays for eighteen months before applying to set it aside, a judgment upon it will not be disturbed: *Brown v. Cinqmars*, 2 P. R. 202. A confession could be given by the attorney of the defendant: *Richmond v. Proctor*, 3 U. C. L. J. 202; but he had better attach his authority to the confession. One of several executors has no power to bind the others by giving a confession: *Commercial Bank of Canada v. Woodruff*, 21 U. C. R. 602. A plaintiff giving time for a debt may take confession as additional security: *Parker v. Roberts*, 3 U. C. R. 114; *Potter v. Pickle*, 2 P. R. 391. There should be an affidavit of execution (Form 32); but where judgment is entered, on a confession without affidavit, it would not be set aside, but the affidavit would be allowed to be filed afterwards: *Potter v. Pickle*, 2 P. R. 391. A confession given by the maker of a note payable immediately is no defence to an action against the endorser: *Bank of Montreal v. Douglas*, 17 U. C. R. 208. If one of two defendants dies after confession and before judgment, leave would be given to enter judgment against the survivor: *Nichall v. Cartwright*, Tay. 464; see letter at p. 313 of 7 U. C. L. J. on Confession.

At the Time of Taking Thereof.—The confession or acknowledgment executed in any other form than here prescribed would operate as an admission of the party of the contents of the instrument, but could not properly be acted upon as a confession. The general opinion is that a confession in the Division Court has not the effect that the same instrument would have under R. S. O. c. 147, though in *Park v. Willcock*, Feb. 16th, 1893, (not reported) it was held that a confession of judgment in a Division Court came within the express terms of that Act, and was void as against creditors when in contravention thereof; and see *Edison General Electric Co. v. Westminster Tramway Co.*, (1897) A. C. 193. But see *Bailey v. Bank of Hamilton*, 21 A. R. 156, where a defence was withdrawn pursuant to the provisions of section 118 of the Division Courts Act.

Judgment Upon Confession.—Unless application for judgment upon confession be made to the judge within three calendar months next after the same is taken, or at the sitting of the court next after the expiration of such period, no execution shall be issued on the judgment to be rendered without an affidavit by the plaintiff or his agent, that the sum confessed, or some and what part thereof, remains justly due; and applications for judgment shall be made at a sitting of the court for the division wherein the confession was taken, or to the judge elsewhere: Rule 102.

See notes to section 113, *ante* pp. 189, 190.

**Affidavit
required in
such cases.**

212. The oath or affidavit shall state that the party making it has not received, and that he will not receive, anything from the plaintiff or defendant, or any other person, except his lawful fees, for taking the confession or acknowledgment, and that he has no interest in the demand sought to be recovered. R.S.O. 1887, c. 51, s. 206.

No Interest in the Demand.—It is intended here to make the officer who takes the confession perfectly independent so far as the oath can make him; and as neither clerks nor bailiffs can sue in their own court, neither can they have any "interest" in the suits of others: see Rule 196, and notes to section 62, *ante* p. 51.

For form of affidavit see Form 32.

COSTS.

**Judge's
authority
as to costs.**

213.—(1) The costs of any action or proceeding not otherwise provided for, shall be paid by or apportioned between the parties in such manner as the Judge thinks fit, and in cases where the plaintiff does not appear in person or by some person in his behalf, or appearing does not make proof of his demand to the satisfaction of the Judge, he may award to the defendant such costs and such further sum of money, by way of satisfaction for his trouble and attendance as he thinks proper, to be recovered as provided for in other cases under this Act, and in default of any special direction, the costs shall abide the event of the action, and execution may issue for the recovery thereof in like manner as for any debt adjudged in the court.

(2) In all actions or other proceedings brought in a Division Court in which the plaintiff fails to recover judgment by reason of the Court having no jurisdiction over the subject matter thereof, the Judge presiding in the Court shall have jurisdiction over the costs of the action or other proceeding, and may order by and to whom the same shall be paid, and the recovery of the costs awarded to be paid may be enforced by the same remedies as the costs in actions or proceedings within the proper competence of the Court are recoverable. R.S.O. 1887, c. 51, s. 207.

Any Action or Proceeding.—See notes to section 58, *ante* p. 48.

As the Judge Thinks Fit.—A very wide discretion is here given to the judge on the subject of costs, but it only applies to cases where no special provision is otherwise made. It would not apply to such cases as are provided for under section 130, and others of a similar nature.

The event is to be taken distributively. If the plaintiff recover as to some items of the claim, and the defendant as to others, the plaintiff is

entitled to the general costs of the suit, and the other costs—*e.g.*, witness fees, will be payable to the party who has succeeded upon the issue in respect of which they were incurred: *Myers v. Defries*, 4 Ex. D. 180; *Stooke v. Taylor*, 5 Q.B.D. 569; *Hawke v. Brear*, 14 Q.B.D. 841.

Formerly it was decided that where a judge had no jurisdiction, he had no power to award costs: *Lawford v. Partridge*, 1 H. & N. 621; *Peacock v. The Queen*, 4 C.B.N.S. 264; *Powley v. Whitehead*, 16 U.C.R. 589; *Campbell v. Davidson*, 19 U.C.R. 222; *Nicholls v. Lundy*, 16 C.P. 160; *Re Kingston Election*, *Stewart v. Macdonald*, 41 U.C.R. p. 313; *Brown v. Shaw*, 1 Ex. D. 425; though the authorities to that effect were disregarded in *Great Northern Committee v. Inett*, 2 Q.B.D. 284: see cases cited in notes, *ante* pp. 305, 306.

This provision is intended to remove any doubts which existed as to the right of a judge to award costs against the plaintiff in such cases.

The judge cannot lay down a general practice that only the costs of such witnesses as are called at the trial shall be allowed and if it be desired to have the fees of witnesses who have not been called allowed, application is to be made to him: *The Cashmere*, 62 L.T. 814; see Rule 291.

Under Rule 295 if the judge directs a fee to be taxed under section 214, or orders any other fee to be taxed or certifies for costs in any case, or when the allowance of any particular costs under any sections of the Act or rules of court, or under any other statutory provision, the application therefor should be made at or immediately after the hearing or final disposition of the case. The judge may make such directions on his list at the time of the trial, or on the back of the summons, or when the action is finally disposed of, in the case of a postponed judgment.

Taxation of Costs.—The clerk must, in every case, make out a bill in detail and the same should be endorsed on an annexed to the summons: Rule 174: The taxation should take place where practicable on the day on which the action is held: and every such taxation is subject to the revision of the judge: see notes to section 47, *ante* p. 37. The parties to the action are entitled to a detailed bill of the costs on payment to the clerk of a fee of 10 cents: Rule 175.

Costs on Notice of Admission of Part.—Either party to an action may give to the other party a notice in writing (Form 19) that he will at the trial admit part of the claim or defence: in which case the opposite party will not be allowed the costs of proving the facts admitted: Rule 103.

Postage, Etc.—The costs of prepaying and registering letters containing papers sent from one Division Court officer to another, or to parties to suits or to the judge, and of all necessary notices sent by the clerk, including postage stamps which are required to be sent to the judge for the return of papers sent to him are in all cases costs in the cause: Rule 300.

214. Where in a contested case for more than \$100, a counsel, solicitor or agent has been employed by the successful party in the conduct of the cause or defence, the Judge may, in his discretion, direct a fee of \$5, to be increased according to the difficulty and importance of the case, to a sum not exceeding \$10, to be taxed to the successful party, and the same, when so allowed, shall be taxed by the Clerk and added to the other costs. R.S.O. 1887, c. 51, s. 208.

Counsel fees.

In a Contested Case.—This section is extended to interpleader cases by section 161, sub-section 2. The fee here given can only be ordered to be taxed when "such agent is a barrister or solicitor:" Rule 288; and it submitted that no fee could be taxed if a clerk or student conducted the case.

"A contested case" is defined by Rule 289 as follows:

(1) Where a defence is put in disputing a claim for more than \$100, and a counsel or solicitor has been retained to prosecute or defend the claim in court, at the sittings, and the case comes down to trial, whether any actual contest is made at court or not.

(2) Where a defence is put in, disputing a claim for more than \$100, and a counsel or solicitor has been retained to make an application under section 111, (now sec. 116), and an order is made therein by the Judge empowering the Clerk to enter final judgment.

(3) Where a defence is put in, disputing a claim for more than \$100, and a counsel or solicitor has been retained to prosecute the claim in Court, and the defendant afterwards and before the opening of the Court, confesses judgment, or pays or settles the claim so short a time before the sitting of the Court that the plaintiff cannot in the ordinary way be notified thereof, and without such notice, the counsel or solicitor so retained to prosecute the claim *bona fide*, attends the Court for that purpose.

(4) Where a defence is put in, disputing a claim for more than \$100, and the defendant has retained a solicitor or counsel to defend the action for him in Court, and the plaintiff does not appear in Court to prosecute his action, or withdraws or discontinues his action so short a time before the sitting of the Court that the defendant cannot in the ordinary way be notified of such withdrawal or discontinuance, and without such notice his solicitor or counsel *bona fide*, attends the Court to defend such action.

Judgment Under Section 116.—Where judgment is moved for under section 116, the power to grant a counsel fee is confined to cases where a defence is put in and an order is made by the judge empowering the clerk to enter final judgment. Under sub-section 4 of that section, the plaintiff may, in certain cases, obtain final judgment for part only of the claim. It would seem that a counsel fee might be allowed for obtaining such an order, but it is submitted only where the amount for which final judgment was ordered exceeded \$100. On the trial of the case for the remainder of the amount claimed a further fee might be allowed, but the total fees allowed in the case must not exceed \$10. Under clauses 3 and 4, no fee is taxable unless a solicitor or counsel *bona fide* attends the court for the purpose of prosecuting the claim or defending the action. The object of the rule is evidently to allow a party the fee which is virtually earned, in many cases, before the trial, and it should not be put in the power of either party to defeat the allowance of such a fee merely by diligence in having due notice given just before the sitting of the court, so that no *bona fide* attendance could be made thereat.

Under Rule 290, a counsel fee may be ordered to be taxed in a contested case, under this section.

(a) Where the plaintiff's claim exceeds \$100;

(b) Or, in the case of interpleader, where the money claimed, or the value of the goods or chattels claimed, or the proceeds thereof exceeds \$100;

(c) Or, where, in interpleader, the damages claimed by, or awarded to either party against the other party, or against the bailiff exceed \$60.

(d) In all other cases mentioned and referred to in sub-section (2) of section 148.

(c) Where the defendant gives notice of set-off or counterclaim and establishes the same to an amount exceeding \$100, and judgment is given in his favor.

This rule extends the provisions of this section to other cases than those originally contemplated by it. A fee will now be taxable in any case, no matter how small the amount involved, provided the parties have consented to an appeal to the Court of Appeal.

The present law of Ontario, in contrast with that of England, permits counsel to sue for the value of professional services: *Armour v. Kilmer*, 28 O.R. 618; *McDougall v. Campbell*, 41 U.C.R. 332; and it would seem that a fee taxed under the provisions of this section could be recovered by a barrister or solicitor in an action against his client. See notes to section 126.

Shall be Taxed by the Clerk.—The clerk's duty is simply a ministerial one, which he is bound to execute, the responsibility of the order being improperly granted, resting with the judge: *Andrews v. Marris*, 1 Q.B. 3; *Graham v. Smart*, 18 U.C.R. 482; *Hill v. Manager of Met. Asylum Dist.*, 4 Q.B.D. pp. 440, 441.

The discretion conferred upon the judge under this section should be exercised according to the principles laid down in *Julius v. Oxford*, (Bishop), 5 App. Cas. 214, and other cases cited in note to section 8, *ante* p. 6, and in notes *ante* p. 332.

Discontinuance of Action.—If the plaintiff discontinues the action and counsel *bona fide* attends court, a counsel fee may be allowed: Rule 252, cited fully in notes to section 215.

See Rule 295 and notes to section 213.

215. Where the defendant having disputed the plaintiff's claim afterwards and before the opening of the Court confesses judgment or pays the claim so short a time before the sitting of the Court that the plaintiff cannot in the ordinary way be notified thereof, and without such notice the plaintiff *bona fide* and reasonably incurs expenses in procuring witnesses or in attending at Court, the Judge may, in his discretion, order the defendant to pay such costs or such portion thereof as to the Judge seems just. R.S.O. 1887, c. 51, s. 209.

Costs of witnesses in certain cases.

Confesses Judgment.—As to when the defendant may confess judgment, see section 211 and notes thereto.

Notified Thereof.—It is the duty of the clerk forthwith to notify any party for whom he may receive money by virtue of his office: section 294; Rule 95.

Reasonably Incurs.—What is reasonable must always be a fact to be determined by the judge, and must be decided with reference to the circumstances of each particular case.

Discontinuance of Action.—If the plaintiff wishes to discontinue the action or matter against all or any of the parties he must give notice to the clerk in writing and to every party as to whom he so desires to discontinue and such party may apply to the judge for an order for payment of costs incurred before the receipt of such notice: Rule 252. In a "contested case," (see notes to section 214) if the defendant or other party has prepared for trial and the action has been discontinued so short a time before the sittings of the court that notice cannot be given and

the defendant has *bona fide* and reasonably incurred expenses in procuring witnesses or in attending court or in cases where a counsel fee might be ordered to be taxed and counsel or a solicitor has been employed who has attended court to conduct the defence for him the judge may order plaintiff to pay such costs, or such disbursements, or counsel fee, or such portion thereof as to him may seem just: Rule 252 (a).

Order for Costs.—It is necessary under this rule to entitle a defendant to his costs (unless the plaintiff pays the same) to obtain an order therefor. Formerly it was necessary that the plaintiff, on discontinuing, should pay the defendant's taxable costs, unless the judge should otherwise order, and in default of his so doing or of his proceeding to trial, the defendant was entitled to his costs as in ordinary cases of non-suit or default by the plaintiff.

See Rule 295 and notes to section 213.

Satisfaction of Judgment.—Any party to a judgment to whom accord and satisfaction or payment of such judgment has been made, may be required by the party against whom such judgment has been rendered to enter or authorize the clerk to enter satisfaction thereof and in case of his refusal or neglect to do either, the judge may, upon application therefor, order satisfaction to be entered by the clerk in the procedure book: Rule 256.

Prior to this Rule payment to the clerk was the only means by which satisfaction of a judgment could be made to appear in the books of the court.

Accord and Satisfaction.—Prior to 1885, payment of a smaller sum was no satisfaction of a larger: *Foakes v. Beer*, 9 App. Cas. 609; but an agreement to accept a sheet of paper, or a stick of sealing-wax, or a bill of exchange, promissory note, or cheque for any amount, would be an accord and delivery of the article agreed upon, pursuant to the agreement, would be a satisfaction: *Sibree v. Tripp*, 15 M. & W. 23, 37; *Curlewis v. Clark*, 3 Ex. 375; *Goddard v. O'Brien*, 9 Q.B.D. 37; *Bidder v. Bridges*, 37 Ch.D. 406. "Accord and satisfaction imply an agreement to take the money in satisfaction of the claim in respect of which it is sent. If accord is a question of agreement, there must be either two minds agreeing, or one of the two persons acting in such a way as to induce the other to think that the money is payment in satisfaction of the claim, and to cause him to act on that view:" *per Bowen, L.J.*, *Day v. McLea*, 22 Q.B.D. 610, p. 613. If a cheque is sent for a smaller amount than a claim or judgment, and is marked in full, it is a question of fact whether the same was accepted in satisfaction of the payment: *Day v. McLea*, 22 Q.B.D. 610; *Mason v. Johnson*, 20 A.R. 412. By the Judicature Act, P.S.O. c. 51, s. 58, s-s. 8, it is enacted that "part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in satisfaction, or rendered in pursuance of an agreement for that purpose, though without any new consideration, shall be held to extinguish the application." In *Canadian Bank of Commerce v. Jenkins*, 16 O.R. 215, an agreement to accept a smaller sum in satisfaction of a debt was made, and it was held that a subsequent tender of the amount agreed upon, although not accepted, was sufficient to entitle the debtor to the benefit of this section: see also *Davey v. Baines*, 9 T.L.R. 29. Mr. Justice Osler, in *Mason v. Johnson*, 20 A.R., p. 415, in commenting upon this decision, said: "It is not now necessary to decide this point, and I may only say that, at present, I am not satisfied that this is the proper construction to be placed on the section."

Order of Judge.—Upon the application for an order that satisfaction be entered up, it should be shown that a notice had been served upon the

judgment creditor requiring him to have satisfaction entered, and a certificate should be obtained from the clerk showing that satisfaction thereof had not been entered or authorized. It should also be shown that the judgment has been satisfied either by accord and satisfaction or by payment.

ACTIONS ON JUDGMENTS.

[**215(a)**. No suit or action shall be brought in the Division Court upon any judgment, decree or order for the payment of money made by the High Court or the County Court where execution may issue in, upon or in respect to such judgment, decree or order.] 61 V. c. 15, s. 9.

Actions not to be brought on judgments of superior courts.

No Suit or Action.—This practically prohibits the bringing of an action in the Division Court upon any judgment, decree or order of the High Court or County Court. It is no doubt intended to prevent proceedings under the judgment summons clauses from being invoked to aid persons having judgments or decrees in the High Court or County Court, upon mortgages of real estate and similar securities, upon which it was found difficult to realize except by harrassing the unfortunate judgment debtor by judgment summons proceedings. These proceedings will be effectually barred by this provision. As to the jurisdiction of the Division Court in such actions; see notes to section 7, *ante* p. 4.

216 No costs shall be recoverable in an action brought in any Court for the recovery of a sum awarded by judgment in a Division Court without the order of the Judge of the Court in which the action is brought, on sufficient cause shown. R.S.O. 1887, c. 51, s. 210.

Costs in actions on judgments.

Action Brought in any Court.—This is apparently a direction to all courts. It is doubtful if an action can be brought upon a Division Court judgment in any other court than a Division Court: see *Berkeley v. Elderkin*, 1 E. & B. 805; *Austin v. Mills*, 9 Ex. 288; *Bailey v. Bailey*, 13 Q.B.D. 855; *R. v. County Court Judge of Essex*, 18 Q.B.D. 706; *McPherson v. Forrester*, 11 U.C.R. 362; *Donelly v. Stewart*, 25 U.C.R. 398; *Aldrich v. Aldrich*, 23 O.R. 376; 24 O.R. 124. See also notes to section 7, *ante* p. 4. While the point remains unsettled, the position that a judgment creditor in the Division Court occupies is not at all enviable. If he wishes to enforce the judgment in a foreign court, he will meet with two objections: first, the judgment is not final; second, the judgment is not the judgment of a Court of Record. As to the first objection, the authorities cited above all proceed upon the want of finality of a Division Court judgment. Such want of finality is said to exist on account of the provisions of section 153. An action cannot be brought upon a foreign judgment for the recovery of a debt if the judgment does not finally and conclusively (subject to an appeal to a higher court), settle the existence of the debt so as to become *res judicata* between the parties; *Patrick v. Shedden*, 2 E. & B. 14; *Nouvion v. Freeman*, 35 Ch. D. 704; 37 Ch. D. 244; 15 App. Cas. 1. As to the second objection, it would not be of any weight in an English tribunal: see *Taylor on Evi.*, 8th ed. 1486; but in some countries no judgment of a foreign court would be enforced unless it were a judgment of a Court of Record. See further, notes on section 230, *post*.

On Sufficient Cause Shown.—As there can be no adverse order for costs, unless expressly authorized by statute, we submit that an order under

this section could not be made except where the opposite party had an opportunity of being heard: see *Lomax v. Berry*, 2 H. & N. p. 128, *per Martin, B.*; *McLean v. Allen*, 14 P.R. 84, 291.

PROCEEDINGS NOT TO BE SET ASIDE FOR MATTERS OF FORM.

Proceedings not to be quashed for want of form.

217. No order, verdict, judgment, or other proceeding had or made concerning any matter or thing under this Act, shall be quashed or vacated for any matter of form. R.S.O. 1887, c. 51, s. 211.

Matter of Form.—Though an adjudication be informal, it will be upheld if it be a substantial decision of the cause: *Oliphant v. Leslie*, 24 U.C.R. 398; see also *Crawford v. Beattie*, 39 U.C.R. 28; *Re Jones v. Julian*, 28 O.R. 60.

For instances of formal defects, see *Ex parte Vanderlinden*, 20 Ch.D. 289; *Ex parte Johnson*, 25 Ch.D. 112; but see *Ex parte Tindall*, 6 De G. M. & G. 741; *McMurray v. Northern Ry. Co.*, 22 Gr. 476.

No proceeding shall be defeated by any formal objection: Rule 236.

Non-compliance with the rules shall not render any proceeding void, unless the judge so directs, but it may be set aside either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the court or judge thinks fit: Rule 237. Where a notice of motion has been irregularly given, but the opposite party has not been injured, the irregularity may be disregarded and the motion heard: *Dawson v. Beeson*, 22 Ch.D. 504. It is not to be treated as void: *Petty v. Daniel*, 34 Ch. D. 172, 180.

A judgment irregularly signed is not a mere non-compliance with the rules which may be remedied hereunder: *Anlaby v. Prætorius*, 20 Q.B.D. 764.

No application to set aside process or proceedings for irregularity shall be allowed unless made within a reasonable time, nor if the party applying has taken a fresh step after knowledge of the irregularity: Rule 238. The filing of a dispute notice would be a fresh step within this rule. If a cause of action should be improperly joined with an action of replevin it would be an irregularity within this rule: *Re Derbon*, 36 W.R. 667.

A mere irregularity in practice is not a ground for prohibition: *Field v. Mellhargey*, 9 P.R. 327; *Carter v. Smith*, 4 E. & B. 696; *Barker v. Palmer*, 30 W.R. 59; *Re Gerow v. Hoyle*, 28 O.R. 405; and other cases cited in notes on Prohibition, *ante* p. 65.

The judge may at any time amend any defect or error in any proceedings: Rule 239. The powers of amendment are very extensive, and cover every case where an amendment may be necessary "for the advancement of justice, determining the real question raised by or depending on the proceedings, and best calculated to secure the giving of judgment according to the very right and justice of the case:" Rule 239.

See notes to section 98, *ante* p. 155 and to section 112, *ante* p. 183.

JUDGEMENT AND EXECUTION.

When money not paid, pursuant to order, execution to issue.

218. In case the Judge makes an order for the payment of money, and in case of default of payment of the whole or of any part thereof, the party in whose favour the order has been made, may sue out execution against the goods and chattels of

the party in default; and thereupon the Clerk, at the request of the party prosecuting the order, shall issue under the seal of the Court an execution to one of the Bailiffs of the Court, who by virtue thereof shall levy by distress and sale of the goods and chattels of such party, being within the county within which the Court was holden, such sum of money and costs (together with interest thereon from the date of the entry of the judgment) as have been so ordered and remain due, and shall pay the same over to the said Clerk. R.S.O. 1887, c. 51, s. 212.

Judgment.—Unless otherwise ordered no execution may issue within fifteen days from entering the judgment given at the trial: section 151: Rule 125.

By a judgment is here meant that final determination of a cause which concludes the parties and their privies to it, and prevents the subject being again litigated, either in the Division Court or any other: *Gibbs v. Cruickshank*, L.R. 8 C.P. 454; *Flitters v. Allfrey*, L.R. 10 C.P. 29; *Austin v. Mills*, 9 Ex. 288; *Dover v. Child*, 1 Ex. D. 172; *Bullock v. Dunlop*, 2 Ex. D. 43; see note to section 7, *ante* p. 3.

So long as a judgment stands, if regularly entered, on proceedings duly taken, it estops either party from denying its correctness or the execution founded upon it: *Huffer v. Allen*, L.R. 2 Ex. 15; *Ventriss v. Brown*, 22 C.P. 345; but if obtained by covin—*i.e.*, secret conspiracy or agreement between two or more persons to injure or defraud another—and collusion, it is no bar, and does not affect third parties: *Girdlestone v. Brighton Aquarium Co.*, 3 Ex. D. 137; 4 Ex. D. 107; see *Edison General Electric Co. v. Westminster Tramway Co.*, (1897) A.C. 193. A defendant in the Division Court who obtains a judgment on a counterclaim for an amount beyond the jurisdiction of the court, but who has not obtained any relief in respect of the balance in excess of the plaintiff's claim is not estopped from afterwards bringing an action in the High Court or County Court upon the same cause of action: but the defendant in the High Court or County Court is estopped from denying the cause of action of the plaintiff in such court, and the only question to be decided therein is the amount of damage: *Webster v. Armstrong*, 34 L.J. Q.B. 236; *Re South American and Mexican Co.*, (1895) 1 Ch. 37.

When Execution May Issue.—On a judgment by default on a special summons under section 113 or a summary judgment issued by order of the judge under section 116, execution may issue forthwith after the entry of the judgment: Rules 125, 131. In other cases, unless the judge otherwise orders, the execution shall not issue until fifteen days after the entry of judgment: section 151: Rule 125.

Execution should not be issued by the clerk without an express order from the party entitled to it: 4 U.C.L.J. 203, 251; *Tuckett v. Eaton*, 6 O.R. 486; or where from a course of business an authorization could be reasonably inferred.

When judgment is given for the defendant on a set-off or counterclaim execution may issue as in ordinary cases, for the recovery of the balance of such set-off or counterclaim if it does not exceed a sum within the jurisdiction of the court: Rule 127; but see notes to section 76.

An execution cannot issue in the name of plaintiff's executor without revival: *Proctor v. Jarvis*, 15 U.C.R. 187; but if issued it may be executed after the death of the plaintiff or defendant: *Rolt v. Gravesend* (Mayor, etc.), 7 C.B. 777; *Turner v. Patterson*, 13 C.P. 412; *Johnston v. Me-*

Kenna, 3 P.R. 229; even upon goods in the hands of the executor: Smith v. Bernie, 10 C.P. 243; see note *infra* "Reviving Judgments."

To conclude a plaintiff by estoppel as to what defendant did in a previous action, it must appear that there was a judgment of the court on the question: Stanton v. Styles, 1 L.M. & P. 575.

A judgment of a Division Court would be aided against the equitable estate of the debtor: Bennett v. Powell, 3 Drew. 326; see notes to section 75.

A judge, at the time, has power to order a judgment given by him to be paid by instalments: Robinson v. Gell, 12 C.B. 191; but not so as to postpone execution longer than fifty days from the service of the summons unless under special circumstances: section 153.

A judgment of a Division Court is not removable into a Superior Court for the purpose of issuing execution thereon: Moreton v. Holt, 10 Ex. 707.

A verbal order of the judge sitting in court is a "judgment" of the court, and can be acted upon: Ely v. Moule, 5 Ex. 918.

See, also, notes to sections 113, 116, 151, 152 and 153, and Rules 116 to 132.

The endorsement of execution for a larger amount than is actually due is not *per se* an injury to the defendant; it must be shown that more goods were seized than were necessary or reasonable to satisfy what was really due, and that the acts complained of were done maliciously and without reasonable or probable cause: Barber v. Daniell, 12 C.P. 68; Saxon v. Castle, 6 A. & E. 652; Tancred v. Leyland, 16 Q.B. 669; Churchill v. Siggers, 3 E. & B. 937.

But an allegation and proof in a similar case that execution was issued wrongfully and maliciously, and without reasonable or probable cause, will support an action for the injury: Dewar v. Carrique, 14 C.P. 137; Gilding v. Eyre, 10 C.B.N.S. 592.

If the defendant pay the debt, he should notify the clerk thereof: Tuckett v. Eaton, 6 O.R. 486; see Rule 198.

Executions should be executed in the order in which the bailiff receives them: 4 U.C.L.J. 251.

An execution from a Division Court only binds goods from the time of seizure: Culloden v. McDowell, 17 U.C.R. 359; *per* Burns, J.; Watts v. Howell, 21 U.C.R. at p. 259.

One who fraudulently removes goods of an execution debtor to prevent their seizure is liable to an action therefor: Young v. Buchanan, 6 C.P. 218; Turner v. Patterson, 13 C.P. 412.

A person purchasing a crop of wheat at a bailiff's sale might bring trespass against a person injuring or converting it: Haydon v. Crawford, 3 O.S. 583.

A sale may be made after the expiry of an execution if a seizure took place while it was in force; but if no seizure was made during that time, the sale is void: *Doe d. Greenshields v. Garrow*, 5 U.C.R. 273; Reynolds v. Streeter, 3 P.R. 315; Lee v. Howes, 30 U.C.R. 292; Hall v. Goslee, 15 C.P. 101.

A seizure by a bailiff before his removal from office on an execution then in force, would, it is submitted, sustain a sale by him after he had ceased to be a bailiff: *Doe d. Miller v. Tiffany*, 5 U.C.R. 79.

There is no warranty of title at a bailiff's sale, unless the bailiff expressly makes one: Chapman v. Speller, 14 Q.B. 621; but there is a warranty that he does not know he is destitute of title to the goods: Peto v. Blades, 5 Taunt. 65; see note to this case, 15 R.R. 611.

The purchaser gets no better title than the execution debtor had; and if he had none, neither does the purchaser acquire any.

A writ of execution issued too soon would not be a nullity but an irregularity only: *Macdonald v. Crombie*, 2 O.R. 243.

Where a writ of execution is not renewed, but not through any default of any officer of the court, it will not be renewed *nunc pro tunc*: *Lowson v. Canada Farmers' Mut. Ins. Co.*, 9 P.R. 309.

An expired execution cannot be renewed: *Macdonald v. Crombie*, 11 S.C.R. 109; *Barker v. Palmer*, 8 Q.B.D. 9; *Doyle v. Kaufman*, 3 Q.B.D. 7; *Neilson v. Jarvis*, 13 C.P. 182, 183; *Price v. Thomas*, 11 C.B. 543; *Cole v. Sherard*, 11 Ex. 482; *Smalpage v. Tonge*, 17 Q.B.D. 644; *Lowson v. Farmers' Mut. Ins. Co.*, 9 P.R. 309.

Where an order had been made which gave an execution priority over one in the sheriff's hands, it was held that the execution creditor, though a stranger to the action in which the order was made, had a *locus standi* to move to set aside the order: *Glass v. Cameron*, 9 O.R. 712.

The terms "*feri facias*" and "warrant of execution," used in the Division Court's Act, are convertible terms: *Macfie v. Hunter*, 9 P.R. 149.

Where a discharge in insolvency is a complete answer to the issue of an execution, see *Forrester v. Thrasher*, 2 O.R. 38; S.C. 9 P.R. 383.

A writ of execution is not a judicial act, and the court may inquire at what period of the day it was issued: *Clarke v. Bradlaugh*, 8 Q.B.D. 63.

A bailiff who has taken possession of goods under a writ of execution has a sufficient special property in them to enable him to maintain trespass and trover: *Krehl v. Great Central Gas Co.*, L.R. 5 Ex. 289-293, or to insure them against fire: *Drake on Attachment*, 5th ed. 291.

It is submitted that goods sold by a bailiff under execution may be lent by the purchaser to the debtor, and that such act is not a contravention of the Bills of Sale Act, provided it is not done for the purpose of protecting the goods against the creditors of such debtor: *Graham v. Furber*, 14 C.B. 410; *Woodgate v. Godfrey*, 5 Ex. D. 24; see *Ex parte Cooper*, *Re Baum*, 10 Ch. D. 313; *Ex parte Odell*, *Re Walden*, 10 Ch. D. 76; *Williams v. McDonald*, 7 U.C.R. 381.

When a person assists a bailiff on an execution, his acts may be considered as those of the bailiff: *McDougall v. Waddell*, 28 C.P. 191.

What Constitutes a Seizure.—Execution sometimes means the writ itself, and sometimes what is done under it: *McDonald v. Cleland*, 6 P.R. 293.

Levy on execution some times means *seizure and sale*: *Ross v. Grange*, 25 U.C.R. 396; *Buchanan v. Frank*, 15 C.P. 198; or the receipt of money: *Traders Bank v. McConnell*, 24 C.L.J. 87.

Seizure is the forcible taking of possession: *Johnston v. Hogg*, 10 Q.B.D. 432. See also *Gladstone v. Padwick*, L.R. 6 Ex. 203; *Gibbons v. Farewell*, 34 Alb. L.J. 497, and cases there cited; *May v. Standard Fire Ins. Co.*, 5 A.R. 605; *Craig v. Craig*, 7 P.R. 209; *Cropper v. Cropper*, 1 Cab. & E. 152.

Seizure of part of the goods in the name of the whole is good seizure of all: *Cole v. Davis*, 1 Ld. Raym. 724.

Where a sheriff went to defendant's house with an execution and merely produced the warrant, at the same time demanding the debt, costs and poundage, which were paid under protest, it was held not to amount to a seizure so as to entitle the sheriff to poundage: *Nash v. Dickenson*, L.R. 2 C.P. 252. But where a sheriff's officer went with another man to defendant's house, showed him the warrant, and demanded payment and told him that on default of payment the man must remain in possession, and further proceedings would be taken, the defendant then paid the sum demanded in the warrant, which included poundage and officer's fees,

it was held there had been a seizure which entitled the sheriff to poundage: *Bissicks v. Bath Colliery Co.*, 3 Ex. D. 174.

See *Lee v. Dangar*, (1892) 1 Q.B. 231, 241, 242; *Craig v. Craig*, 7 P.R. 209; *Cropper v. Warner*, 1 Cab. & E. 152. See also note *infra*, "Abandonment and Priority of Execution."

Bailiff's Duties.—On receiving an execution, the bailiff must endorse on the same a correct statement of the day of its receipt by him: Rule 188. Whether several executions against the same person are delivered into the bailiff's hands, or he receives them by post, that execution should be first executed which the bailiff first sees. Seizure should be made, and the money paid over according to their priority: *Hazlett v. Hall*, 24 U.C.R., at p. 486; *Rowe v. Jarvis*, 13 C.P. 495; *Bank of Montreal v. Munroe*, 23 U.C.R. 414; *Dennis v. Wethern*, L.R. 9 Q.B. 345.

A bailiff cannot make a valid contract for the sale of the goods of a judgment debtor, against whom he holds a writ of execution, until he has actually seized the goods: *Ex parte Hall, Re Townsend*, 14 Ch.D. 132; *Samis v. Ireland*, 4 A.R. 141.

Unless by section 7 of this Act (whereby all judgments in Division Courts are declared to have the same force and affect as judgments of Court of Record), it would seem that interest would not be recoverable on any judgment which the party might pay independently of execution. A right to interest on such judgments appears to depend upon the language here used within parentheses: see *R. v. The County Court Judge of Essex*, 18 Q.B.D. 704.

It will be observed that the Statute (R.S.O. c. 170, ss. 30 *et seq.*) respecting distress for rent and taxes, provides that whatever goods are exempt from execution, are to be exempt from distress, and makes further provision in regard to goods which are exempt.

A return of *nulla bona* where there were goods is no more than an irregularity to be complained of by the defendant, and a third party cannot object that such a return was made at the instance of the solicitor of the plaintiffs: *Molsons Bank v. McMeekin*, 15 A.R. 535.

A return of *nulla bona* may be properly made after the expiration of the writ: *Ib.*

Where the goods of a third party were seized and sold under an execution against the judgment debtor, and damages were recovered by such third party against the sheriff, and paid by the plaintiff in accordance with an undertaking to indemnify the sheriff, an *alias fi. fa.* issued by the plaintiff in spite of the sheriff's return to the previous writ, "money made and paid to plaintiff's attorney" was set aside and satisfaction entered upon the judgment roll; and a summons to amend the sheriff's return discharged: *Hanna v. McKenzie*, 9 C.L.T. 358.

An execution is "completely executed by payment" within the meaning of R.S.O. c. 147 s. 11, when the bailiff gets the money: see *Clarkson v. Severs*, 17 O.R. 592.

Requisites of Executions.—All executions and warrants must be printed on half sheets of foolscap paper: Rule 132.

If in an execution and the endorsements, the names of the plaintiffs and defendants are transposed throughout, it is clearly irregular: *Davidson v. Grange*, 5 P.R. 258.

An execution not entitled in the cause, but giving the names of the parties to the cause in which the judgment was recovered, and the date and amount, is valid and sufficient to protect the sheriff levying thereunder: *McAskill v. Power*, 30 N.S.R. 189.

After seizure under a Division Court execution the property in the goods remain in the debtor until sale: *Giles v. Grover*, 1 Cl. & F. 72, 219; and the execution creditor is in the position of a secured creditor: *Ex parte Williams*, L.R. 7 Ch. 314; *Slater v. Pender*, L.R. 7 Eq. 95. A receiver in lunacy appointed after seizure does not obtain priority: *Re Clarke*, (1898) 1 Ch. 336.

Setting Aside An Execution.—An execution would not be set aside at the instance of a subsequent creditor, a stranger to the execution: *Perrin v. Bowes*, 5 U.C.L.J. 138; notes *supra* p. 381; but if judgment and execution are fraudulent, they can both be set aside in an action by a subsequent execution creditor: *Balfour v. Ellison*, 8 U.C.L.J. 330; *Commercial Bank v. Wilson*, 3 E. & A. 257; *Bowerman v. Phillips*, 15 A.R. 679; see also *Glass v. Cameron*, 9 O.R. 712.

Costs.—A plaintiff who has recovered a judgment for debt and costs, and has received the debt out of Court, is entitled to have execution for costs, and a mandamus would be granted to the clerk to compel its issue: *R. v. Fletcher*, 2 E. & B. 279; *Re Linden v. Buchanan*, 29 U.C.R. 1.

As to costs where judge has no jurisdiction, see section 213 (2), and notes thereto.

Where Execution May Issue for Part of Claim Without Prejudicing Right to Remainder.—See section 113, *ante* p. 185; notes *ante* pp. 189, 204 and Rules 117, 118, 120.

Abandonment and Priority of Execution.—The question whether a bailiff or other officer abandons a seizure by withdrawing for a time is a question of fact depending on the circumstances of the case and the necessity for such withdrawal. If, for instance, he should go out temporarily for the purpose of obtaining food, or to see a doctor, he would not abandon the possession, but if he went out to assist the debtor, and to enable a sale to be made of the debtor's business, it would probably be held to be an abandonment of possession: *Bagshaws (Ltd.) v. Deacon*, (1898) 2 Q.B. 173. On chattels being seized by the sheriff, and afterwards, by direction of the plaintiff's attorney, abandoned, it was held that the execution debtor could sell and give a good title to the goods: *Gould v. White*, 4 O.S. 124. A chattel seized by the sheriff, and lent by him before return of the writ, was held no abandonment: *Hamilton v. Bouek*, 5 O.S. 664. A sheriff, having seized goods under an execution, took a bond for the delivery thereof when he required them, and allowed the debtor to remain in possession and carry on his business as before the seizure; and while the debtor so continued in possession, and after the return day of the writ had expired, a second execution at the suit of another creditor was received by the sheriff; it was held that the second writ took precedence of the first: *Castle v. Ruttan*, 4 C.P. 252; see *R. v. Carley*, 18 C.L.T. 26; and where there was an understanding between the execution creditor and the debtor that the execution was not to be proceeded with until other creditors pressed, and the debtor continued to carry on the business, it was held that the writ was not in the sheriff's hands to be executed when seizure was afterwards made under a subsequent execution: *Hazley v. McArthur*, 11 Man. L.R. 602, following *Pringle v. Melsanc*, 11 Price 445; *Kempland v. Macaulay*, 1 Peake, 95. As remarked by Macaulay, C.J., *Castle v. Ruttan*, 4 C.P., at p. 260, in delivering the judgment of the court, "The sheriff, in the absence of directions, acts upon his own responsibility; and if he adopts a course which conflicts with the rights of others, he may incur responsibility to the first execution creditor or to the second; but he has no discretion to bond the goods to the debtor or suffer him to continue the possession or use of the goods and to prosecute his business with them as before, suspending and deferring the execution

indefinitely, and until long after its return, without further acting upon it, and at the same time to interpose the expired writ between the writ of another creditor and the goods." After two ineffectual attempts by the sheriff to sell certain articles, which he considered chattels, he left them where they were; the execution debtor removed and sold them. It was held that the seizure had not been abandoned, and that the sheriff might retake them: *Walton v. Jarvis*, 14 U.C.R. 640. Where the plaintiff's attorney had ordered execution to be stayed, and afterwards telegraphed the sheriff that he must act as he thought fit, it was held that this answer was an abandonment of the stay: *Boulton v. Smith*, 17 U.C.R. 400. The bailiff, having merely made an inventory of the goods seized under a *fi. fa.*, leaving no one in possession, it was held that they were not in *custodia legis*, and therefore could not be held against the landlord's claim for rent: *Hart v. Reynolds*, 13 C.P. 501. A sheriff having seized goods under an execution, left them in the possession of the execution debtor upon receiving a receipt for the same, with an undertaking to deliver them to the sheriff when requested so to do, the landlord of the execution debtor having in the meantime seized and sold the goods for rent due him by the debtor, it was held, in an action by the sheriff, that he had not at the time of the distress such a possession of the goods as prevented the landlord from distraining for rent: *McIntyre v. Stata*, 4 C.P. 248. But the taking of a bond from the tenant to the bailiff to produce and keep and deliver the chattels, and not to remove them nor allow them to be removed from the premises, and to hold them for the bailiff, is not evidence of an abandonment but the contrary: *Anderson v. Henry*, 29 O.R. 719; see also *Robertson v. Fortune*, 9 C.P. 427; *R. v. Carley*, 18 C.L.T. 26. Long delay of a writ in a sheriff's hands does not of itself amount to an abandonment of it, but it is evidence of it: *Mein v. Hall*, 13 C.P. 518. Taking an execution by the plaintiff to the clerk for renewal would not be an abandonment of it: *Rowe v. Jarvis*, 13 C.P. 495; *Meneilly v. McKenzie*, 3 E. & A. 209. In an action against a sheriff for a false return, it appeared that on the day before the plaintiff's writ came in, he received a *fi. fa.* at the suit of one K. for more than the value of the debtor's goods, and gave a warrant to his bailiff, who only went to the debtor's shop and told him of it, because he thought more could be got by allowing him to go on with his business. On the plaintiff's writ he did nothing. The plaintiff's attorney wrote twice, urging him to act and ruled him, and afterwards he returned the writ *nulla bona*. K.'s writ having been previously renewed, the court being left to draw inferences of fact, it was held, as a matter of fact, that the sheriff never seized; or, as a matter of law, if he did, he had abandoned the seizure: *Foster v. Glass*, 26 U.C.R. 277. A bailiff who has withdrawn from possession of goods after seizure may again seize them if the writ is in force: *Gates v. Smith*, 13 C.P. 572. As to the difference between the rights of a subsequent execution creditor, as in *Castle v. Ruttan*, and one who purchases from an execution debtor, even after abandonment of the seizure, but while the execution is in force, see the remarks of Gwynne, J., at pages 470 and 471 of 19 C.P. in *McGivern v. McCausland*; see also 5 U.C.L.J. 250. In that connection it must be borne in mind that a Division Court execution does not bind the goods before seizure: *Culloden v. McDowell*, 17 U.C.R. 359, whereas a writ in the sheriff's hands does. Under The Creditors' Relief Act, R.S.O. c. 78 s. 2 *et seq.*, all execution creditors are entitled to rank ratably on the moneys in the hands of the sheriff; see *Harvey v. McNeil*, 12 P.R. 362; and see notes to section 234 *infra*. But this will not prevent an execution creditor losing his priority as against executions then in the sheriff's hands or subsequently coming into his hands, if a stay is directed, as for instance where a writ was delivered to a sheriff, with instructions not to levy until another

execution came in, it was held that a subsequent execution took priority: *Ross v. Hamilton*, E.T. 3 Vic. Such a writ is not in the sheriff's hands to be executed: *Foster v. Smith*, 13 U.C.R. 243; *Re Ross*, 3 P.R. 394. If the bailiff is notified not to proceed and execute a writ, from that moment it loses its priority: *Bank of Montreal v. Munro*, 23 U.C.R. 414; *Patterson v. McKellar*, 4 O.R. 407; see also *Kerr v. Kinsey*, 15 C.P. 531; *Trust and Loan Company v. Cuthbert*, 13 Gr. 412. A sheriff cannot seize goods on execution already under the seizure of a Division Court bailiff: *King v. Macdonald*, 15 C.P. 397; but he may obtain them from the bailiff under the Creditors' Relief Act: see *infra*. The foregoing cases are principally on *fi. fa.'s* in the hands of sheriffs, but it is submitted that the principles of them have a direct application to Division Court executions in the hands of a bailiff, always keeping in mind that a bailiff's right to the goods is by virtue of a *continuing seizure*. If a bailiff should enforce an execution where he had no authority he would be liable: *Davis v. Moore*, 4 U.C.R. 209. In *Lossing v. Jennings*, 9 U.C.R. 406, a bailiff, having an execution against J.L., went to him and seized a yoke of oxen, which he allowed him to retain on receiving by endorsement on the writ an acknowledgment of the levy, it was held that the debtor had put it out of his power to sell the oxen; see also *Duffus v. Creighton*, 14 S.C.R. 740. Where after making the seizure, the bailiff placed a man in charge, who afterwards left the premises, and the goods were then seized by the defendant's landlord for arrears of rent, it was held that the goods were not in *custodia legis* at the time of the taking under this distress: *Cross v. Davidson*, 17 C.L.T. 189. Where a sheriff seized goods in the morning, and went away, intending to return in the evening, and visited the property daily, he was held to continue possession: *Beatty v. Rumble*, 21 O.R. 184. On an execution against A., money belonging to him in the hands of B. may be seized but it must be shown that it is the *identical money* of A.: *Clarke v. Easton*, 14 U.C.R. 251.

As to action against third party for illegal seizure, and evidence connecting him with it: see *Slaght v. West*, 25 U.C.R. 391; *McClevertie v. Massie*, 21 C.P. 516; *Tilt v. Jarvis*, 7 C.P. 145; *McLeod v. Fortune*, 19 U.C.R. 98; *Kennedy v. Patterson*, 22 U.C.R. 556; *Cronshaw v. Chapman*, 7 H. & N. 911; *Woollen v. Wright*, 1 H. & C. 554; *Stevens v. Pennoek*, 30 U.C.R. 51; *Smith v. Keal*, 9 Q.B.D. 340; *Wilkinson v. Harvey*, 15 O.R. 346.

219. If there are cross judgments between the parties, the party only who has obtained judgment for the larger sum shall have execution, and then only for the balance over the smaller judgment, and satisfaction for the remainder and also satisfaction on the judgment for the smaller sum shall be entered; and if both sums are equal, satisfaction shall be entered upon both judgments. R.S.O. 1887, c. 51, s. 213.

Cross judgments may be set off.

Cross-Judgments.—In case there are cross-judgments between the parties to an action, the judge, on the application of either party, may by order direct the clerk to make an entry thereof in the procedure book, and that the party only, who has obtained judgment for the larger sum shall have execution, and the clerk shall, if required, issue execution thereon in the ordinary form, for the balance over the smaller judgment; and he shall enter satisfaction on the judgment for the smaller sum. If both sums are equal satisfaction shall be ordered to be entered upon both judgments. (See Forms 223-226 inclusive): Rule 144.

Satisfaction Shall be Entered.—This is simply applying the principle of setting off judgments: *Throckmorton v. Crawley*, L.R. 3 Eq. 196; *Mercer*

v. Graves, L.R. 7 Q.B. 499; *Ex parte Griffin, Re Adams*, 14 Ch. D. 37; Grant v. McAlpine, 46 U.C.R. 284; Brown v. Nelson, 11 P.R. 121; C. P. Ry. Co. v. Grant, 11 P.R. 208; Flett v. Way, 14 P.R. 312; Moody v. Canadian Bank of Commerce, 14 P.R. 258.

A set-off will not be allowed to the prejudice of a solicitor's lien for costs: C. P. Ry. Co. v. Grant, 11 P.R. 208; Flett v. Way, 14 P.R. 312; see notes to section 202.

Writs of execution where to be executed.

220. Except in actions brought under section 85 of this Act, no writ in the nature of a writ of execution or attachment shall be executed out of the limits of the County over which the Judge of the Court from which the writ issues has jurisdiction. R.S.O. 1887, c. 51, s. 214.

Not to be Executed out of Limits of County.—Every writ of execution or attachment must be executed within the county from which it issues, except in cases where the sitting of the court is nearest to defendant's residence as provided in section 85. If such writ should be executed out of the county the bailiff would be a trespasser: Davis v. Moore, 4 U.C.R. 209; Campbell v. Coulthard, 25 U.C.R. 621; Davy v. Johnston, 31 U.C.R. 153; Hoover v. Craig, 12 A.R. 72.

Where an execution is required to be issued anywhere within the county it may be directed to the bailiff of any of the Division Courts within the county, but it shall not be issued to the bailiff of another county: Rule 124; see notes to sections 107 and 108.

If party removes to another county, execution obtainable in such county.

221. In case a party against whom a judgment has been entered up removes to another County without satisfying the judgment, the County Judge of the County to which the party has removed may upon the production of a copy of the judgment duly certified by the Judge of the County in which the judgment has been entered, order an execution for the debt and costs, awarded by the judgment, to issue against such party. R.S.O. 1887, c. 51, s. 215.

The provisions of this section are seldom resorted to. Proceedings by transcript under section 223 are usually adopted.

Effect of payment of execution before sale.

222. If the party against whom an execution has been awarded, pays or tenders to the Clerk or Bailiff of the Division Court out of which the execution issued, before an actual sale of his goods and chattels, the amount to be levied under such execution, or such part thereof as the party in whose favour the execution has been awarded agrees to accept in full of his debt, together with the fees to be levied, the execution shall thereupon be superseded, and the goods shall be released and restored to such party. R.S.O. 1887, c. 51, s. 216.

Pays or Tenders.—See notes to sec. 128.

To the Clerk or Bailiff.—The bailiff would have no authority to receive it if he had not an *existing* execution in his hands or a warrant of commitment: Rule 199; 5 U.C.L.J. 32; Preston v. Wilmot, 23 U.C.R. 348;

Kero v. Powell, 25 C.P. 448. The clerk would not be allowed to receive any money in settlement of a claim unless a suit had been commenced in his court for the recovery thereof: Rule 199; see also section 62 and notes thereto. Payment otherwise than under an execution in the bailiff's hands should be made to the clerk: Rule 198.

Fees to be Levied.—Should the proper fees be tendered and refused, further proceedings by the bailiff would render him liable as a trespasser: *Bennett v. Bayes*, 5 H. & N. 391. And remaining in possession would be a trespass each day: *Playfair v. Musgrave*, 14 M. & W. 239; *Ash v. Dawney*, 8 Ex. 237. As to what are proper fees, see the tariff: Form 2.

Formerly a return of *nulla bona* did not entitle the bailiff to mileage: see 5 U.C.L.J. 82, 181. But under Rule 298 if the plaintiff or other person interested in an execution or an attachment insists upon the bailiff making an attempt to find property, whereby mileage and expenses are to be incurred, he must deposit the bailiff's fees with the clerk, and if the bailiff makes a proper endeavor to the satisfaction of the clerk to secure property whereon to levy he shall be entitled to his fees. Two facts are necessary to entitle the bailiff to mileage where no goods are seized, *i.e.*, that the judgment or attaching creditor insists upon the bailiff making an attempt to find goods, and a proper endeavor on the part of the bailiff to secure such property. There is no provision made for ascertaining the amount of fees to be deposited, but the proper amount would no doubt be the mileage which the clerk would be entitled to tax under the tariff. The allowance by the clerk of mileage in such a case is subject to an appeal to the judge who may review the clerk's finding that a proper endeavor has been made to levy.

Goods to be Released and Restored.—The object of this section is to allow a party to settle the amount of debt and costs before an actual sale of his goods and chattles. When he has paid or tendered the amount called for or which the judgment creditor agrees to accept and the fees to be levied, he has a right to have his goods released and restored to him.

If the defendant pay the debt to the plaintiff after service on him of a summons, the defendant should notify the clerk thereof. When after such a payment a transcript was issued to another court than that in which the summons was issued and execution was issued thereon and the defendant's goods were seized, it was held that he could recover no damages against the plaintiff as it was his duty to protect himself by seeing that the clerk of the court was notified of the payment: *Tuckett v. Eaton*, 6 O.R. 186. In that case it was said to be doubtful, under this section, whether a person whose goods had been seized under Division Court process could have any further relief than the return of his goods: see Rule 125.

223.—(1) The Clerk of a Division Court shall, upon the application of a plaintiff or defendant (or his agent), having an unsatisfied judgment in his favour in such Court prepare a transcript of the entry of the judgment and shall send the same to the Clerk of any other Division Court, whether in the same or any other County, with a certificate at the foot thereof signed by the Clerk who gives the same, and sealed with the seal of the Court of which he is Clerk, and addressed to the Clerk of the Court to whom it is intended to be delivered, and stating the amount unpaid upon the judg-

Clerk of any court in which judgment entered to prepare transcript thereof, to transmit to any other Division Court.

ment and the date at which the same was recovered; and the Clerk to whom the certificate is addressed shall, on the receipt of the transcript and certificate, enter the transcript in a book to be kept in his office for the purpose, and the amount due on the judgment according to the certificate; and all proceedings may be taken for the enforcing and collecting the judgment in such last mentioned Division Court, by the officers thereof, that could be had or taken for the like purpose upon judgments recovered in any Division Court. R.S.O. 1887, c. 51, s. 217.

Proceedings stayed in office from which transcript of judgment is issued.

(2) After a transcript has been issued under this section, no further proceedings shall be had in the Court from which the transcript issued without an order from the Judge, unless the creditor, his solicitor or agent, shall make and file with the Clerk of the said Court an affidavit stating; (1) That the judgment remains unsatisfied in whole or in part; (2) That the execution issued in the division to which the transcript was issued has been returned *nulla bona*, or that he believes the defendant has not sufficient goods in that Division to satisfy the said judgment, and upon such affidavit being filed, the Clerk may issue such other process as the creditor may direct. 52 V. c. 12, s. 24.

Upon the Application of a Plaintiff or Defendant.—Under this section the clerk cannot, upon his own mere motion, prepare and send the transcript which this section requires. It can only be done upon the application of the plaintiff or the defendant, or the agent of either party, as the case may be. The transcript may show whether the whole or any part of a judgment remains unsatisfied, and the clerk shall be bound to send the same to the clerk of any other Division Court whether in the same or any other county, with a certificate at the end thereof signed by him and sealed with the seal of the court of which he is clerk, and addressed to the clerk of the court to whom it is intended to be delivered.

All Proceedings May Be Taken.—Where a plaint was brought in the wrong division and the defendant filed a notice disputing the claim and the jurisdiction of the court, but did not appear at the trial, and judgment was given against him; and subsequently a transcript of the judgment was transmitted to the court of the division in which defendant resided, it was held that the judgment did not thereby become a judgment of the latter court, and prohibition was granted to the court in which the judgment was originally obtained notwithstanding such transmission: *Re Elliott v. Norris*, 17 O.R. 78; see *Labatt v. Chisholm*, 2 West, L.T. 54. Nevertheless, the bailiff of the foreign court cannot be called to account by the judge of the home court: *R. v. Shropshire* (Judge) 20 Q.B.D. 242.

How Transcript Prepared.—The transcript shall be prepared by the clerk upon a full sheet of foolscap paper, carefully written in a plain hand or printed without contraction of words or figures and shall be according to Forms 164, 164(a), or 164 (b), and if judgment has been revived the order of revival or its purport shall be set forth therein: Rule 134 (b).

Not to Issue Until After 14 Days from Trial.—In cases brought to trial the transcript shall not issue until after the lapse of 14 days from the trial, except upon the order of the judge: Rule 136; see notes to section 151: Rule 125.

If judgment has been entered under section 116 the transcript may issue immediately. The judge must make an order for the issue of the transcript if it is desired for any reason that it should issue before the lapse of 14 days. An order for payment forthwith or for execution to issue forthwith would not be sufficient.

Not to Issue Where Proceedings Have Abated.—Where proceedings have abated or where no warrant of execution or judgment summons has been issued on a judgment more than six years old the judgment must be revived before transcript issues: Rule 135; as to reviving judgments, see Rules 139 to 143 and notes to section 226.

Enter the Transcript in a Book.—The entries in proceedings required under this section may be made in the procedure book in the form of an ordinary suit, as near as may be: see Rule 147; and the procedure book shall for that purpose be the transcript of judgment book required by the Act: Rule 137.

After a Transcript Has Been Issued.—All proceedings in the original court are stayed after the issue of the transcript therefrom to another Division Court unless: (1) the judge otherwise orders or (2) unless the creditor, his solicitor or agent shall make and file with the clerk an affidavit stating the facts set out in the language of the context: see Forms 39 and 266; in which case the clerk may issue such other process as the creditor may direct: see Rule 134 (a).

The clerk's functions cease on issue of the transcript and he cannot even act as agent for the judgment creditor or order for him or anyone else that the money paid thereon shall be transmitted to himself or any other person: Rule 134. The clerk issuing the transcript is required to enter the same in the procedure book: Rule 134 (a). But the plaintiff or other person entitled to the money may by an order in writing, endorsed on the transcript signed by himself direct the clerk of the foreign court to pay over the money, when collected, to the transmitting clerk or clerk of the home court, or in any other way such person so entitled may desire and direct: Rule 248. Moneys transmitted according to directions are at the risk of the party who gave them, and all necessary expenses shall be borne by the party to whom transmitted and may be deducted by the clerk: Rule 247.

There is nothing in the rule expressly requiring the clerk of the foreign court to obey the directions endorsed on the transcript. The party entitled to the money may, however, direct their transmission to him under Rule 247. As to the clerk's duties on receipt of money, see section 302, Rules 163, 164, 165 and 247. See also notes to section 222.

224 Where any Division Court judgment or execution has been or shall hereafter be filed with any Sheriff under *The Creditors' Relief Act*, or a certificate for any claim within the jurisdiction of the Division Court, and the same is not paid in full, and the Sheriff is unable to make the money thereon, the creditor may obtain a return thereof from the Sheriff according to the facts, and file the same with the Clerk of the Division Court in which the judgment was recovered, or in the place where the cause of action arose, or

Enforcing
claims
under
Creditor's
Relief Act
in Division
Courts.
Rev. Stat.
c. 78.

the debtor, or one of the debtors, if more than one, resided, and the Clerk of the Division Court shall enter the same in his proper books, and it shall thereupon become a judgment of the said Court for the unpaid balance due thereon as appearing by the Sheriff's return, and the claim may be enforced in the same manner as any other judgment of the Division Court. 51 V. c. 11, s. 4.

A Certificate for any Claim.—See notes to section 218, *ante* p. (818) citing The Creditor's Relief Act, R.S.O. c. 78.

A Return Thereof From the Sheriff.—Where the sheriff's return relates to a judgment or execution of the Division Court, and is filed with the clerk of the court in which such judgment was recovered or from which the execution issued, the clerk enters the same in the procedure book at the place where the judgment was entered, setting forth the sheriff's return according to Form 95; and where the sheriff's return relates to a certificate for a claim within the Division Court jurisdiction the entry of it will be according to Form No. 96: Rule 133.

The effect of this is that if judgment was originally entered in the Division Court the judgment stands thereafter for such balance as remains unpaid. If the first entry in the procedure book is the sheriff's return the clerk enters judgment for the balance of the claim unpaid and proceedings may be taken thereon as upon any other judgment of the court: An execution against goods, or a transcript of judgment to another court, a judgment summons, or a garnishee summons might be issued thereon: and the provisions of section 75 may also be resorted to.

Clerk to
give notice
to plaintiff
of return of
nulla bona
in case of
execution
on a trans-
cript of
judgment.

225. The Clerk of every Division Court shall, immediately after *nulla bona* has been returned to an execution issued on a transcript of judgment received from another Court, forward through the post office to the plaintiff, if his address is known, or to the Clerk who issued the transcript, at his post office address, a notice, enclosed in an envelope, informing him of the date at which the execution issued, the date at which the same was returned by the Bailiff, and the return made thereto, the notice thus sent shall be prepaid and registered, and the Clerk shall obtain and file among the papers in the action the post office certificate of the registration, and the postage and charge for registration shall be costs in the cause: the absence from amongst the papers in the action of the certificate of registration, shall be *primi facie* evidence against the Clerk that the notice has not been forwarded. R.S.O. 1887, c. 51, s. 218.

Notice of Return of Nulla Bonna.—The clerk to whom a transcript is sent is here required to send *immediately* through the post, prepaid and registered, to the plaintiff, if his address is known, or to the clerk who issued the transcript, a notice informing him: (1) When the execution issued: (2) the date of its return: (3) the return of the bailiff thereto. As to the meaning of "immediately" see note to section 117. The language of this section requires the clerk to send the notice to the plaintiff

if his address is known, and it is only when his address is not known to him that the clerk should send it to the clerk who issued the transcript. The object is to bring home the nature of the return to the person most interested—the plaintiff. The absence of the registration certificate is only *prima facie* evidence of the notice not having been sent. The statute would be virtually complied with if there was any other evidence of the notice having been received by the plaintiff or the clerk who issued the transcript: *Campbell v. Barrie*, 31 U.C.R. 279. But the safest course is for the clerk to carefully preserve the certificate of registration in all cases.

This section was held in *Jones v. Paxton*, 19 A.R. 163, to have changed the law laid down in *Burgess v. Tully*, 24 C.P. 549, and to have rendered it unnecessary to the validity of a transcript to the county court that execution shall issue out of the home court.

As to the address of parties see Rules 3 and 241.

226. In case of the death of either or both of the parties to a judgment in a Division Court, the party in whose favour the judgment has been entered, or his personal representative in case of his death, may revive the judgment against the other party, or his personal representative in case of his death, and may issue execution thereon in conformity with any rules which apply to the Division Court in that behalf. R.S.O. 1887, c. 51, s. 219.

Revivor of judgment in case of death of party.

Reviving Judgments.—See notes to section 7, *ante* pp. 4 and 5, and Rules 139 to 143 inclusive. The party who seeks to revive a judgment or against whom it is sought to revive the same, must be duly appointed the personal representative before proceedings can be taken. *I. Keena v. O'Hara*, 16 C.P. 435, it was held that an action might be revived against an execution *de son tort*.

Leave to Issue Execution.—Leave must be obtained from the judge: (1) If the judgment is more than six years old, and no payment has been made thereon within twelve months previously: no notice to the debtor is necessary before applying for such leave, but the execution warrant or summons issued thereon must express such leave in the words, "*Issued by leave of the judge*:" Rule 141.

The appointment of a receiver is not "execution" within the meaning of the rule: *Norburn v. Norburn*, (1894) 1 Q.B. 448.

(2) Under Rule 140 leave to issue execution is necessary in the following cases: (a) Where any change has taken place after judgment, by death or otherwise, of the parties entitled to execution. If a sole plaintiff died, it would be necessary to obtain leave under this section. If one of two or more judgment creditors dies, however, execution may issue without leave: see Rule 143. Notwithstanding that the word "assignment" is omitted, an assignee of the judgment would probably be entitled to revive the judgment in his own name: *Phillips v. Fox*, 8 P.R. 51. In *East End Bdg. Socy. v. Slack*, 60 L.J.Q.B. 359, it was held that the assignee of the judgment, who had taken out a judgment summons in the name of the judgment creditor, was not entitled to an order until he had previously obtained leave to enforce the judgment under this rule. This was in 1891, and in the following year Order 25, r. 9a, of the English C.C., which corresponds with this rule, was amended by the addition of the word "assignment." If the judgment debtor died, no execution could be issued against his legal representatives except by leave under this rule, and the leave should not be granted

ex parte, nor unless it was first established that the representative has assets to answer the judgment debt: *Re Trusts Corporation and Boehmer*, 26 O.R. 191; (b) Where a husband is entitled or liable to execution upon a judgment or order for or against his wife: see R.S.O. c. 163, sections 16, 17 and 18; (c) Where a party is entitled to execution on a judgment of assets in future, (but see Rule 97, *ante* p. 282, which provides a different procedure, and which, it is submitted, should be followed); (d) Where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recovered against such company, or against a public officer, or other persons representing such company.

Application for Leave.—The application must be made upon affidavit, and at least three days' notice must be given to the opposite party, unless under special circumstances the judge otherwise orders. The judge may, on the application, direct an issue to be tried in which the party applying would affirm and the other party deny the right to have execution issued: Rule 140. If the judgment creditor should be in danger of losing the amount of his claim during the delay caused by the application being made, the judge would probably dispense with the notice.

The Right of Survivorship.—Where one or more of several plaintiffs or defendants shall die after judgment, proceedings may be taken by or against the survivors or survivor without leave: Rule 143. In that case the right to enforce the judgment accrues to the survivors or survivor, even though they are partners in business: *Davis v. Andrews*, W.N. (1884) 94. A judgment debtor, of course, remains liable on the judgment, notwithstanding the death of any of his co-debtors.

An action does not become abated by the marriage, death or insolvency of any of the parties if the cause of action survives or continues, nor does it become defective by the assignment, creation or devolution of any estate *pendente lite*: Rule 223; see notes to section 112, *ante* p. 180.

During the lives of the parties, or any of them, execution may issue at any time within six years from the recovery of judgment: Rule 139; see notes *ante* p. 5.

Execution,
when dated
and return-
able.
Rev. Stat.
c. 77.

227. Every execution shall be dated on the day of its issue and shall be returnable within thirty days from the date thereof, but may from time to time, be renewed by the Clerk at the instance of the execution creditor, for six months from the date of such renewal, in the same manner and with the same effects as like writs from the Courts of Record may be renewed under the provisions of *The Execution Act*. R.S.O. 1887, c. 51, s. 220.

Within Thirty Days.—A writ issued on 24th April was held in force on 24th May: *Clarke v. Garrett*, 28 C.P. 75. The effect of which decision is that the day of issue is excluded: see notes to section 90, *ante* p. 144, and to section 113, *ante* p. 187. The renewal of an execution must take place at the instance of the execution creditor before the expiration of thirty days, unless a seizure has been made thereunder. The renewal cannot take place if the thirty days have expired. If the seizure has been so recent that the bailiff has been unable to advertise and sell the property within thirty days he must make a report to the clerk of the condition of matters and of the facts of the case so as to enable the clerk to report them to the execution creditor: Rule 185 (a).

An execution that has expired cannot be renewed: notes to section 218, *ante* p. 381; and nothing can legally be done under it: *Weston v. Thomas*, 6 U.C.L.J. 181; *Gardiner v. Juson*, 2 E. & A. 188; and a sale by the defendant of his goods would cut out the execution creditor, or any one claiming under a supposed sale on such writ: *Carroll v. Lunn*, 7 C.P. 510; *Buffalo & L.H. Ry. Co. v. Brooksbanks*, 16 U.C.R. 337; section 218 and notes thereto.

The too common practice of clerks renewing executions at the instance of bailiffs or of their own motion, is entirely unwarranted and of no legal effect: see 5 L.C.G. 175, 176. It is doubtful if an execution creditor could ratify such an act: *Brook v. Hook*, L.R. 6 Ex. 95; *Westloh v. Brown*, 43 U.C.R. 402; *Turner v. Wilson*, 23 C.P. 87. Certainly not unless done *within* the time for which the renewal was made: *Ainsworth v. Creeke*, L.R. 4 C.P. 476; nor perhaps at all: *Taylor v. Ainslie*, 19 C.P. 78; *Prince v. Lewis*, 21 C.P. 63; *Patterson v. Fuller*, 32 U.C.R. 240. The authority to the clerk to issue executions should not imply a right to renew it. The unauthorized renewal of an execution, by the clerk, even if it could be ratified, would not affect the rights of other creditors before ratification: *Ainsworth v. Creeke*, L.R. 4 C.P. 476; *Bird v. Brown*, 4 Ex. 796; *Hutchings v. Nunes*, 1 Moo. P.C. 243; but see *Vanderlip v. Smyth*, 32 C.P. 60; *Bolton Partners v. Lambert*, 41 Ch. D. 295.

For Six Months.—This means six calendar months: Interpretation Act s. 8, s.s. 15.

The renewal of an execution may be made from time to time by the clerk issuing the same, by marking in the margin thereof "Renewed for six months from the date thereof. Dated _____ day of _____ 1900. X. Y., Clerk." Rule 142.

From Time to Time.—This means that it may be renewed more than once: see *Neilson v. Jarvis*, 13 C.P. 176, and other cases cited in notes to section 33, *ante* p. 22.

An execution need not be renewed when it has been acted upon or levy made: *Neilson v. Jarvis*, 13 C.P. 176; see also *Miller v. Beaver M. F. Ins. Assn.*, 14 C.P. 399.

Leave to Issue Execution.—If an execution is more than six years old, unless some payment has been made thereon within twelve months previously, an execution cannot issue without leave, and such leave must be expressed upon it in the words: "*Issued by leave of the judge*:" Rule 141.

228. Where the books, papers and other matters in the possession of any Clerk, by virtue of or appertaining to his office, become the property of the County Crown Attorney, under section 52 of this Act, or in case of the suspension of a Clerk, the County Crown Attorney may, during such suspension, or until the appointment and qualification of another Clerk, when the same shall be presented for that purpose, renew any writ of execution issued out of such court, which may lawfully be renewed, and the renewal shall have the same force and effect as if the same had been renewed by the Clerk of the Court, and he shall be entitled to the same fees therefor as a Clerk would be entitled to for the like services. R.S.O. 1887, c. 51, s. 221.

Renewal of
executions
by County
Attorney in
certain
cases.

Section 52 of this Act.—See p. 41, *ante*.

Suspension of the Clerk.—See sections 30 and 32, *ante* p. 21.

Renew Any Writ of Execution.—See notes to section 227.

Judge may
order an
execution
to issue
before regu-
lar day.

229. In case the Judge is satisfied upon application on oath made to him by the party in whose favour a judgment has been given, or is satisfied by other testimony that such party will be in danger of losing the amount of the judgment if compelled to wait till the day appointed for the payment thereof before any execution can issue, the Judge may order an execution to issue at such time as he thinks fit. R.S.O. 1887, c. 51, s. 222.

At Such Time as He Thinks Fit.—The application must be made to the judge, and it had better be so made upon affidavit in due form to be filed in the court. Such affidavit must be made by the party in whose favor such judgment has been given. It could not be made by any other. Should such affidavit not be obtainable, the judge could satisfy himself by other testimony (by which is meant either affidavit or oral testimony) that the party would be in danger of losing the amount of the judgment if compelled to wait until the day appointed for payment thereof, before any execution could issue, and might order an execution to issue forthwith or at such time as he thinks fit.

From the context of this section, and the object it has in view, we are of opinion that the application could be made *ex parte*: see Rules 249 and 251.

Executions
against
lands.

230.—(1) In case an execution against goods is returned *nulla bona* by a Bailiff in the Court in which the judgment was recovered, and the sum remaining unsatisfied on the judgment amounts to the sum of \$40, the party in whose favour the judgment was entered may sue out an execution against the lands of the party in default, and the Clerk of the Court in which such judgment was obtained shall, at the request of the party prosecuting the judgment, issue under the seal of the Court a writ of execution against the lands of the party in default to the Sheriff of the County in which the said return of *nulla bona* was made, or to the Sheriff of any other County in this Province in which lands of the party in default are situate and which writ may be in the form contained in Schedule D. 57 V. c. 23, s. 8 (1 part, 5, 6).

(2) The Sheriff, on receipt of such execution, shall act upon the same, and it shall have the same force and effect against the lands of the party in default as an execution issued from the County Court. 57 V. c. 23, s. 8 (1 part).

Sheriff's
return to be
made to
Clerk.

(3) The Sheriff receiving such writ of execution shall make a return thereof, and pay any money made thereon, to the Clerk of the Court out of which such execution issued. 57 V. c. 23, s. 8 (3).

(4) Until such judgment is fully paid and satisfied, the party entitled to the same may, subject to section 231, pursue the same remedy for the recovery thereof, or of any balance due thereon, as if the judgment had been obtained in the County Court. 57 V. c. 23, s. 8 (2).

Return Nulla Bona.—By the provisions of this section the meaningless practice which was declared unnecessary in *Jones v. Paxton*, 19 A.R. 163, has been revived. Although the judgment debtor may not reside in the division in which judgment is recovered, the return of *nulla bona* by the bailiff of the court of that division is a condition precedent to the right to issue an execution against such debtor's lands.

The return of *nulla bona* is made when there are no goods to distrain upon: see *Wharton*, 512.

If the execution should expire, nothing having been done within three months, a return of *nulla bona* may be made after that time: *Molsons Bank v. McMeekin*, 15 A.R. 535.

Should a seizure be made before the execution expires, there need be no renewal of the execution: *Neilson v. Jarvis*, 13 C.P. p. 183, *per Draper, C.J.*; notes to section 7, *ante* pp. 4 and 5; notes to sections 226, 227, *ante* pp. 391-393. But if on such seizure, part of the money were made and *nulla bona* returned as to residue, an execution against the defendant's lands may be issued for such residue, provided it amounts to \$40 or upwards.

If the execution is against more than one defendant the goods of all should be exhausted before a return of *nulla bona*: *Ontario Bank v. Kerby*, 16 C.P. 35; *Molsons Bank v. McMeekin*, 15 A.R. 535.

In the latter case the plaintiff recovered a judgment in the Division Court and issued an execution thereon, under which nothing was made and which expired by lapse of time. At the request of plaintiff's solicitor the bailiff returned the writ *nulla bona*, although it was alleged that there were goods out of which the debt might have been levied. Upon this return the plaintiffs procured a transcript of their Division Court judgment in regular form and filed the same in the office of the clerk of the County Court and sued out a *fi. fa.* goods in order to obtain the benefit of the provisions of the *Creditor's Relief Act*. The respondent S., the holder of the execution in the Division Court, then moved to set aside the plaintiff's proceedings and they were accordingly set aside by the County Court Judge on the ground that the judgment in the County Court was void, being founded on a return to an expired execution.

Held, that a return of *nulla bona* where there were goods was not more than an irregularity to be complained of by the defendant. Nor could a third party object that such return was made at the instance of the solicitor of the plaintiffs.

Held, also, reversing the judgment of the County Court, that a return of *nulla bona* could be properly made after the expiration of a writ: and that the transcript and judgment in the County Court founded thereon were valid and regular.

Sum Remaining Unsatisfied.—By this section transcripts of judgment from the Division Court to the County Court are abolished; and an execution against lands may be issued direct from the Division Court, without the intervention of the County Court, in cases where the "sum remaining unsatisfied on the judgment under which the execution issued amounts to the sum of \$40." This means the whole or any balance remaining unpaid on the judgment whether for debt or debt and costs. The costs of recovering the judgment when taxed by the clerk and

entered in the proceedure book are as much a part of the judgment debt as the principal money or damages recovered. It is submitted that under section 6 interest on the judgment can be estimated under this section: see notes to section 7. The costs of execution are also "part of the sum remaining unsatisfied on the judgment." The costs of execution are chargeable against the defendant and he could not *satisfy* the judgment without discharging such costs also. So also would costs of a judgment summons. It would be anomalous that a plaintiff should be obliged to issue execution in the Division Court before he could proceed against the lands of the defendant, and then that the costs of doing so should not form part of the amount of his unsatisfied judgment: see *Burgess v. Tully*, 24 C.P. 549.

A creditor for less than \$40 cannot attack a conveyance of land as fraudulent: *Zilliax v. Deans*, 20 O.R. 539.

Shall Have the Same Force as if Issued from the County Court.—Under such a writ, the lands of the debtor in the county, to the sheriff of which the writ is issued, will be bound from the time of the delivery of the writ. The judgment creditor will at once, upon such delivery, obtain a charge against such lands. He would be entitled to redeem, and would be entitled to notice of the exercise of a power of sale contained in a mortgage of the lands if the mortgagor "or his assigns" were entitled to such: *Commercial Bank v. Watson*, 5 U.C.L.J. 163; *Re Abbott and Medcalf*, 20 O.R. 299.

The sheriff could sell an equity of redemption in lands, and also any contingent interest therein, under sections 29-33 of R.S.O. c 77. The interest of a judgment debtor in the proceeds of lands vested in trustees, or which he had contracted to sell, would not be bound by such an execution: *Re Lewis and Thorne*, 14 O.R.133; see *Parke v. Riley*, 3 E. & A. 215; *Re Trusts Corporation of Ontario and Boehmer*, 26 O.R. 191; *Davey v. Williamson*, (1898) 2 Q.B. 194. Such interest could be reached by the appointment of a receiver.

Pursue the Same Remedies.—The judgment creditor is not entitled, after the issue of a writ against lands, to take any further proceedings in the Division Court without an order of the judge, except after filing the affidavit mentioned in section 231. In pursuing the same remedies for the recovery of his judgment, as if the judgment had been obtained in the County Court, it will frequently become necessary for further proceedings to be taken in the Division Court. No proceeding can now be taken upon the judgment in the County Court. Had the original sections providing for a transcript to such court remained, proceedings in the County Court might have been taken for examination, attachment of debts, or other purposes.

Is it intended by the section to take away the right of the judgment creditor to examine the judgment debtor? It would appear that no such examination could take place without a special order of the judge, or after an affidavit in the terms of section 231 had been filed.

Action on Judgment.—See notes to sections 7, 215a and 216.

Equitable Execution.—In the County Courts, proceedings by way of equitable execution against lands not subject to an ordinary writ of *fiery facias* may be taken according to established rules: see C.R. 1015 and 1016, but the rights on a Division Court execution are not clear. If the judgment debtor be possessed of an equity of redemption in lands subject to two mortgages, the same cannot be sold under, nor will it be bound by, a writ of execution issued pursuant to this section: *Samis v. Ireland*, 4 A.R. 122; *Kerr v. Styles*, 26 Grant 309; *Johnson v. Bennet*, 9 P.R. 337; *Peters v. Stoness*, 13 P.R. 235; or where there is but one mortgage, but it covers lands in different counties: *Goold v. Rich*, 4 Chy. Cham. 87;

see *infra*; or where the interest which the debtor has in the land is under an agreement to purchase: *Re Prittie v. Crawford*, 9 C.L.T. 45; but this case has been declared to have been inadvertently decided or reported: *Ward v. Archer*, 24 O.R. 650. It is true that under section 75 of the Division Courts Act, the Division Courts are to grant such relief, redress or remedy, or combination of remedies, either absolute or conditional, as might and ought to be done in a like case by the High Court: see *ante* pp. 106-109; and that by section 312 of the Act the county judges may, in their discretion, adopt and apply the general principles of practice in the High Court. In *Wood v. Leatham*, 61 L.J.Q.B. 215, it was said, with reference to section 164 of the English County Courts' Act, 1888, which is similar in this respect to section 312, that the practice of the High Court of Justice should be followed in all cases where the same is not inconsistent with the provisions of the English County Courts Act. The rule in this province, however, does not appear to be so wide: see *ante*, p. 108, and cases there cited. It is possible that Rules 1015-1020 are introduced into the practice of the Division Courts by virtue of subsection 4 of section 230, under which the judgment creditor is entitled to pursue the same remedy for the recovery of the judgment, or of any balance due thereon, as if the judgment had been obtained in a County Court. It is clear that, under a judgment obtained in a County Court, proceedings might be taken as provided for in those rules, and there seems to be no reason why the Division Court remedies should not be pursued in the same manner as those in the County Court. In a matter where the title to land may be affected, it is important that these doubts should be removed. If the judgment cannot be sued on, the judgment creditor would be unable to reach assets of the debtor, which otherwise would be liable, except by the adoption of the principles and practice of equitable execution. It is submitted, therefore, that a judgment creditor who finds interests in real estate vested in his debtor, which his execution will not enable him to sell, may move for an order for sale thereof, and may file a *lis pendens* in the registry office upon serving the notice of motion, and such registration will thereupon have the effect of preventing the debtor from disposing of his interest. The judge may then direct an enquiry as to the interest of the debtor, and on such interest being ascertained may direct a sale, or he may direct a sale in the first instance.

The rules referred to are as follows:

SUMMARY INQUIRIES IN AID OF EXECUTION.

1015. Where a judgment creditor alleges that the judgment debtor has made a conveyance of his lands which is void, as being made to delay, hinder or defraud creditors or a creditor, it shall not be necessary to institute an action for the purpose of setting aside the conveyance, but a motion may be made to the Court or a Judge by the judgment creditor, calling upon the judgment debtor and the person to whom the conveyance has been made, or who has acquired any interest thereunder, to show cause why the lands embraced therein, or a competent part thereof, should not be sold to realize the amount to be levied under the execution. Con. Rule 1007.

1016. Where a judgment creditor alleges that the judgment debtor is entitled to or has an interest in land which can not be sold under legal process, but can be rendered available only by proceedings for equitable execution by sale for satisfaction of the debt, the Court or a Judge may, upon the application of the creditor, call upon the judgment debtor and the trustees or other person having the legal estate in the land in question, to show cause why the said land, the interest therein of the judgment debtor or a competent part should not be sold to realize the amount to be levied under the execution. Con. Rule 1008.

1017. Upon any application under either of the Rules 1015 or 1016, such proceedings shall be had, either in a summary way, or by the trial of an issue, or by inquiry before an officer of the Court, or by an action, or otherwise, as the Court or Judge may deem necessary or convenient for the purpose of ascertaining the truth of the matters in question, and whether the land or the judgment debtor's interest therein is liable for the satisfaction of the execution; but if in a case in a County Court there is a dispute as to material facts, and the value of the land, or the debtor's interest therein, appears to be over \$400, the Court or Judge shall direct the trial of an issue in the High Court, and may name the county in which the trial is to take place, subject to any order that the High Court or a Judge thereof may see fit to make in that behalf. Con. Rule 1009.

1018. In County Court and Division Court cases the application under Rules 1015 and 1016 shall be made to the County Court, or to a Judge of a County Court, of the county or union of counties in which the land is situate, unless the Court or Judge upon the hearing of the application deems it more convenient and more conducive to the ends of justice to order that the proceedings be had and taken in the Court or before a Judge of the County Court of the county or union of counties within the limits of which the execution was issued; in which case the Clerk of the County Court of the county in which the land lies shall transmit the papers filed with him, together with the order of transference, to the Clerk of such other County Court. Con. Rule 1010.

1019. Where in a summary way or, upon the trial of an issue, or as the result of an enquiry under Rules 1015 to 1018, any land, or the interest of a debtor therein, is found liable to be sold, an order shall be made by the Court or Judge, declaring what land or what interest therein is liable to be sold, and directing sale thereof by the Master according to the usual practice. Con. Rule 1011.

1020. A notice of motion for an order under Rules 1015, 1016 or 1018, may contain a description of the land in question, and upon filing the same with the proper officer, signed by the solicitor of the applicant, a certificate of *lis pendens* may be issued for registration, and in case the said motion is refused in whole or in part, a certificate of the order, for registration, may be issued. Con. Rule 1012.

If these rules should not be applicable an action for equitable execution would be necessary: *Whidden v. Jackson*, 18 A.R. 439, but see notes to section 75.

Where Execution Against Land Renewable.—By R.S.O. c. 77 s. 9, all writs in the sheriff's hands remain in force for a period of three years, or until satisfied in the meantime by payment or withdrawal and every writ may be renewed from time to time for periods of three years in the same manner as a writ of execution was renewable from year to year.

Proof of Title.—By R.S.O. c. 73 s. 36 it is enacted that: "In proving title under a sheriff's conveyance based upon an execution issued from the Division Court, it shall be sufficient to prove the judgment recovered in the Division Court, without proof of any prior proceedings."

As a general rule, all circumstances required by the statute to give jurisdiction must appear on the face of the proceedings, or by reasonable intendment: *ante* p. 58. The section is intended to avoid the necessity of alleging jurisdiction and proving the regularity of all proceedings in the Division Court. The section does not, in terms, make the judgment conclusive of the jurisdiction of the court, and, although the proof of the judgment will be sufficient to prove a *prima facie* title in the purchaser from the sheriff, there seems to be nothing to prevent the want of jurisdiction or the invalidity of the Division Court judgment from being set up by a person claiming adversely to the purchaser.

What May be Sold Under Execution Against Lands.—The Execution Act R.S.O. c. 77, s. 30, provides that the sheriff or other officer to whom a writ of execution against the lands and tenements of a mortgagor of real estate is directed, may seize, and sell, and convey all the interest of the mortgagor in the mortgaged lands and tenements, and that the equity of redemption in a freehold mortgage of real estate shall be saleable under an execution against the lands and tenements of the owner of the equity of redemption in his lifetime, or in the hands of his executors or administrators after his death, subject to the mortgage, in the same manner as lands and tenements can now be sold under an execution.

Term of Lands.—Lands cannot be sold under an execution within twelve calendar months from the day of the delivery of the writ to the sheriff: C.R. 877; R.S.O. c. 144, s. 3. But where an execution against lands has been in the sheriff's hands for twelve months, and returned, nothing having been done under it, the sheriff may sell under an alias *fi. fa.* issued thereon without waiting a year: *Campbell v. Delihanty*, 24 U.C.R. 236; *Niehall v. Crawford*, Tay. 277; *Ruttan v. Levisconte*, 16 U.C.R. 495. And the court or a judge may order a sale of the lands before the expiration of the twelve months, under a *fi. fa.* against an absconding debtor against whom an order for attachment has been issued: C.R. 878.

Advertisement of Sale.—See C.R. 881. Defects in the advertisement will not invalidate the sale if there has been no collusion or improper conduct on the part of the purchaser: *Patterson v. Todd*, 24 U.C.R. 296; *Ross v. Malone*, 7 O.R. 215, 397. Nor will the omission to advertise at all, where there is no uncertainty as to what has been sold, though it may give a right of action against the sheriff: *Osborne v. Kerr*, 17 U.C.R. 134, 141; *Lee v. Howes*, 30 U.C.R. 292; notes to section 238. And even if the purchaser be one of the execution creditors, errors or defects in the advertisement will not affect his title: *Patterson v. Todd*, 24 U.C.R. 296; but if the execution creditor becomes the purchaser at a price greatly below the value of the property, effect will only be given to the transaction as security for the debt and costs, and not as an absolute purchase: *Kerr v. Bain*, 11 Gr. 423; so also if the creditor interfered to prevent competition at the sale and bought the property at one-half its value: *Re Davis*, 17 Gr. 613.

A sheriff should make reasonable inquiries as to what property the execution debtor has, and his interest in it; he should not advertise more of the estate than he finds the debtor is interested in, and if he knows what the debtor's interest is, he should give such a statement of it in the advertisement as a prudent owner would; and in regard to these matters, he is not justified in acting irregularly by the instructions of the plaintiff's solicitor, against his own judgment: *McDonald v. Cameron*, 13 Gr. 84. A third person who purchases and gets a sheriff's deed is not affected by irregularities on the part of the sheriff, unless the circumstances are such that the purchaser's taking the deed may be said to amount to fraud: *Ib.*

An irregularity in the notice of an adjourned sale may be waived by the execution debtor, by his attendance at the sale and by his subsequent ratification of the proceedings: *Doe d. Dissett v. McLeod*, 3 U.C.R. 297. Where owing to the title being in dispute, the land was sold for a price greatly below its value the court refused to give effect to the sheriff's deed except as a security for the debt: *Chalmers v. Piggott*, 11 Gr. 475; *Malloch v. Plunkett*, 11 Gr. 439. But inadequacy of price alone is not a ground for the interference of the court unless it is very greatly below the value of the property sold: *Laing v. Matthews*, 14 Gr. 36.

Where it appeared that the sheriff had been advised not to complete the sale on the ground of irregularities in the advertisement, and after advertising again, sold the lands at a price in excess of the offer received

at the first sale, a summary application by the purchaser at the first sale to compel the sheriff to execute a deed to him was refused: *Re Campbell*, 10 U.C.R. 41.

The advertisement of the lands in the *Ontario Gazette* during the currency of the writ is a sufficient commencement of the execution to enable the same to be completed by a sale and conveyance of the land after the writ has become returnable: C.R. 882; see *Hall v. Goslee*, 15 C.P. 101. But a sale under an expired writ, or in pursuance of an advertisement of sale first published in the *Ontario Gazette*, after the writ has expired, is void: *Gardiner v. Juson*, 2 E. & A. 188; *Reynolds v. Streeter*, 3 P.R. 315; *Lee v. Howes*, 30 U.C.R. 292; *Doc d. Burnham v. Simmonds*, 9 U.C.R. 436; and so also is a return of "lands on hand for want of buyers:" *Lee v. Howes*, 30 U.C.R. 292. The fact that the sheriff had told the debtor that he had an execution against his lands, which would be sold unless he paid the debt, was held not to be an inception of execution under the above rule, although the sheriff had been on the lands more than once before the writ expired: *Bradburn v. Hall*, 16 Gr. 518. There must be a compliance with the rule and an actual publication of the advertisement during the currency of the execution: *Reynolds v. Streeter*, 3 P.R. 315.

Where there has been misconduct on the part of the sheriff in the conduct of the sale an injunction will be granted to restrain him from executing a deed to the purchaser: *Jones v. Jones*, 15 Gr. 40.

Sales of Equity of Redemption in Lands.—Sales of Equities of Redemption are governed by the same rules as sales of land: C.R. 877-882. An Equity of Redemption to be saleable under execution must be such as arises under the terms of the instrument creating the security. Where a deed is absolute in form, any right of redemption or re-purchase is not bound by or saleable under an execution: *McCabe v. Thomson*, 6 Gr. 175; *McDonald v. McDonell*, 2 E. & A. 393; *Fitzgibbon v. Duggan*, 11 Gr. 188. An equity of redemption is saleable only where there is but one mortgage, or at most, when it is an equity existing between one mortgagor and one mortgagee: *Wood v. Wood*, 16 Gr. 471; *Donovan v. Bacon*, 16 Gr. 472*n*; *Re Keenan*, 3 Ch. Chamb. 285; *Kerr v. Styles*, 26 Gr. 309. See *Parr v. Montgomery*, 27 Gr. 521, where three mortgages were held by one mortgagee. An equity of redemption is an entire whole: *Faulds v. Harper*, 2 O.R. 405; 11 S.C.R. 639, and therefore the interest of the debtor in a part of the lands comprised in the mortgage is not saleable: *Shaw v. Tims*, 19 Gr. 496; *Vannorman v. McCarty*, 20 C.P. 42, and if two tenants in common mortgage land, the interest of one of them is not bound by and cannot be sold under execution: *Crown v. Chamberlin*, 27 Gr. 551, and if lands comprised in a mortgage are in different counties, an execution will not affect the equity of redemption: *Heward v. Wolfenden*, 14 Gr. 188.

If a person entitled to an undivided interest in land has mortgaged the same, his equity of redemption therein is exigible: *Rathbun v. Culbertson*, 22 Gr. 465. The correctness of the decisions that the equity of redemption under two mortgages upon the same lands is not exigible, is open to doubt. In *Samis v. Ireland*, 4 A.R. 118, both *Moss, C.J.O.*, and *Patterson, J.A.*, who alone gave judgments, thought the statute wide enough to authorize the sale of such an equity. It had been held that a purchaser of a leasehold interest, which was subject to two mortgages, could not keep the first mortgage alive as against the second mortgagee, being bound by the effect of his purchase to pay off both mortgages: *McDonald v. Reynolds*, 14 Gr. 691. It would seem that unencumbered property may be put up for sale with an equity of redemption in one parcel: *Samis v. Ireland*, 4 A.R. 118.

It has been questioned whether a mortgagee, who recovers judgment upon the covenant contained in the mortgage, can sell the equity of

redemption under an execution upon such judgment. The purchaser is bound to satisfy the mortgage. The amount, it has been said, therefore, which is realized by the sheriff, should, of right, be paid over to the mortgagor as the value of his estate in excess of the mortgage: *Vannorman v. McCarty*, 20 C.P. 47. "There has always," said Gwynne, J., "appeared to me to be something so inconsistent, as to be impracticable, in the law permitting money to be levied under an execution issued upon a judgment, which money is not payable to the judgment creditor; while the operation of the sale, by means of which it was levied, is to nullify the judgment without satisfying it, leaving the judgment creditor a mortgagee still, but stripped by his own act of the benefit of the covenant contained in his mortgage, and of the judgment which he had recovered thereon:" *Id.*; see also *Samis v. Ireland*, 28 C.P. 478, 484. It was pointed out by Patterson, J.A., in *Samis v. Ireland*, 4 A.R., at p. 136, that a judgment upon a covenant in a mortgage is almost necessarily for more than the mortgage debt, and the view of Gwynne, J., has not been adopted in any reported case. A purchaser of the equity of redemption, even though he be the mortgagee, will take precedence of an intermediate fraudulent conveyance: *Parr v. Montgomery*, 27 Gr. 521.

The equity of redemption of a deceased mortgagor may, since 27 Vic. c. 13, be sold on an execution against his personal representatives: *McEvoy v. Clune*, 21 Gr. 515. Sales by devisees will not prevent the sheriff selling: *Johnston v. Sowden*, 19 Gr. 224. A sale cannot be made for a debt not contracted by the deceased: *Samis v. Ireland*, 4 A.R. 118; *Freed v. Orr*, 6 A.R. 600; notwithstanding judgment against his representatives: *Ianson v. Clyde*, 36 C.L.J. 215.

Effect of Sale.—The effect of the seizure or taking in execution sale and conveyance of mortgaged lands and tenements shall be to vest in the purchaser, his heirs and assigns, all the interest of the mortgagor thereon at the time the writ was placed in the hands of the sheriff or other officer to whom the same is directed, as well as at the time of the sale and to vest in the purchaser, his heirs and assigns, the same rights as the mortgagor would have had if the sale had not taken place: and the purchaser, his heirs or assigns, may pay, remove or satisfy any mortgage, charge or lien which at the time of the sale existed upon the lands or tenements so sold, in like manner as the mortgagor might have done: and thereupon the purchaser, his heirs and assigns, shall acquire the same estate, right and title as the mortgagor would have acquired in case the payment, removal or satisfaction had been effected by the mortgagor: and on payment of the mortgage money to the mortgagee by the purchaser, his heirs or assigns, the mortgagee, his heirs or assigns, shall, if required, give to the purchaser, his heirs or assigns, at his or their charge, a certificate of payment in satisfaction of the mortgage, which certificate may be in the following form, that is to say:

To the Registrar of the County of _____ I, A.B., of _____ do certify that C.D. of _____ who has become the purchaser of the interest of E.F., of _____ has satisfied all money due upon a certain mortgage made by the said E.F. to me bearing date the _____ day of _____ 19____ and registered at _____ of the clock in the forenoon (as the case may be) of the _____ day of _____ in the same year (or as the case may be), and that such mortgage is therefore discharged.

As witness my hand, this _____ day of _____ 19____ Signed A.B.

E.H., of _____ }
G.H., of _____ } Witnesses.

and such certificate shall be of the like effect, and shall be acted upon by registrars and others to the same extent as if the same had been given to the mortgagor: R.S.O. c. 77, s. 31.

If the purchaser pays off the mortgage he becomes entitled to the legal estate, and if the sale by the sheriff should be void, the remedy of the mortgagor would be redemption of the mortgage, not ejectment: *Howes v. Lee*, 17 Gr. 459. Care should be taken in obtaining the discharge to have it given in the above form, otherwise the legal estate may become vested in the purchaser: *Lee v. Howes*, 30 U.C.R. 536.

Purchase by Mortgagee.—A mortgagee, whether he is the plaintiff or defendant in the judgment upon which the execution under which the sale takes place, may become the purchaser at the sheriff's sale, and acquire the same interests or rights thereby as any other purchaser. But if the mortgagor becomes the purchaser he must discharge the mortgage debt. If any other person becomes the purchaser, and the mortgagee enforces payment of the mortgage debt against the mortgagor, the purchaser must repay the debt and interest to the mortgagor, and in default of payment thereof within one month after demand, the mortgagor may recover the debt and interest from the purchaser, and will have a charge therefor upon the mortgaged lands: R.S.O. c. 77, s. 32.

Contingent Interests.—Such interests in land as a person may have under section 8 of The Act respecting the Transfer of Real Property, (R.S.O. c. 19) or over which he has any disposing power which he may exercise for his own benefit without the assent of any other person, are liable to seizure and sale under execution in the same manner and on like conditions as lands are by law liable to seizure and sale under execution. But the right of a married woman to dower is not exigible under execution before the death of her husband: R.S.O. c. 77, s. 33.

The equitable interest of an assignee from a purchaser under a contract for the sale of lands is exigible, and a purchaser from the sheriff is entitled to specific performance of the contract: *Ward v. Archer*, 24 O.R. 650.

The interest which a husband formerly had in the real estate of his wife might be sold under execution: *Moffatt v. Grover*, 4 C.P. 402. It is submitted that a husband has no exigible interest in the separate property of his wife during her lifetime. A right to dower consummate, is saleable under execution as a possibility coupled with an interest, and, but for sub-section 2 of R.S.O. c. 77, s. 32, an inchoate right to dower would be exigible: *Rose v. Zimmerman*, 3 Gr. 598; *Miller v. Wiley*, 16 C.P. 529; *Allen v. Edinburgh Life Assn. Co.*, 25 Gr. 306.

An interest is contingent where a right of enjoyment is to accrue on an event which is dubious and uncertain: *Fearnie on Contingent Remainder*, 2.

An executory interest is an interest which is limited by a will or conveyance to uses, and which would not be valid at common law as a contingent remainder: *Challis on Real Property*, 58.

Property over which a person has a disposing power under the Act respecting the Transfer of Real Property, includes all property which under a deed or will, the debtor might appoint to his own use: *London Chartered Bank of Australia v. Lempriere*, L.R. 4 P.C. 572.

Entireties.—Neither the estate of the husband nor the wife when they hold by entireties can be seized or sold under an execution: *Griffin v. Patterson*, 45 U.C.R. 536.

Sales Against Executors.—The title or interest of a testator or intestate in real property may be seized and sold under an execution upon a judgment recovered by a creditor of the testator or intestate against his executor or administrator: R.S.O. c. 77, s. 35. The judgment creditor must have been a creditor of the deceased: *Freed v. Orr*, 6 A.R. 690. Lands are assets in the hands of an executor or administrator, and as a

defence of *plene administravit* the plaintiff may show that there are lands: *Gardiner v. Gardiner*, 2 O.S. 520; *Seaton v. Taylor*, 3 U.C.R. 302; *Sickles v. Asseltine*, 10 U.C.R. 203; but such a reply would seem to be unnecessary: *Mein v. Short*, 9. C.P. 244; 11 C.P. 430; *Holton v. McDonald*, 12 C.P. 246. The heirs and devisees of the deceased are *prima facie* bound by a judgment against personal representatives: *Lovell v. Gibson*, 19 Gr. 280; *Willis v. Willis*, 19 Gr. 573; but the parties interested in the real estate are at liberty to show that there was no debt due; *Hanson v. Clyde*, 36 C.L.J. 215. If persons appointed executors by a will, defend an action against them as executors, they will, without probate, be held to have accepted the office; and a good title to the testator's lands may be conveyed by the sheriff under an execution on a judgment recovered in such action: *McDonald v. McDonald*, 17 A.R. 192.

A judgment against an executor *de son tort* will not authorize the sale of the lands of deceased: *O'Connor v. Dafee*, 15 U.C.R. 386; *Wrathwell v. Bates*, 15 U.C.R. 391; *Graham v. Nelson*, 6 C.P. 280.

If the estate is insolvent the creditors must be paid ratably, and the personal representatives on being sued should either set up the insolvency or obtain an order for administration: see 10 C.L.T. 277; *Re Trusts Corporation of Ontario and Boehmer*, 26 O.R. 191. This, of course, could not be done in the Division Court, and where an administration order could not be granted it would appear that if there were sufficient assets to satisfy the claim the insufficiency of assets to satisfy all claims would be no defence: *Parsons v. Gooding*, 33 U.C.R. 499.

Rules Governing Sales.—The rules governing the sales of land under such execution are comprised in C.R. 877-882.

877. The Sheriff shall not expose the lands for sale under a writ of *feri facias*, or sell the same within less than twelve months from the day on which the writ is delivered to him. Con. Rule 901.

878. Where a writ of *feri facias* is issued against an absconding debtor in which an order for attachment has been issued, the Court or a Judge may order the Sheriff to sell lands of the absconding debtor before the expiration of the twelve months, but in other respects in like manner as in other cases. Con. Rule 902.

879. A sale of lands shall not be had under any writ of *feri facias* until after the return of *nulla bona*, in whole or in part, in the same action or matter by the Sheriff of the same county. Con. Rule 904.

880. If the amount authorized to be made and levied under a writ of *feri facias* is made and levied thereunder out of goods and chattels, the person issuing the writ shall not be entitled to the expenses of any seizure or advertisement of lands thereunder; and the return to be made by the Sheriff to the writ for sale of lands shall be to the effect that the amount has been so made and levied as aforesaid. Con. Rule 905.

881.—Before the sale of lands under a writ of *feri facias*, the Sheriff shall publish an advertisement of sale in the *Ontario Gazette*, at least six times, specifying:

- (a) The particular property to be sold;
- (b) The names of the plaintiff and defendant;
- (c) The time and place of the intended sale;
- (d) The name of the debtor whose interest is to be sold.

and he shall, for three months next preceding the sale, also publish such advertisement in a public newspaper of the county in which the lands lie, or shall for three months put up and continue a notice of such sale in the office of the Clerk of the Peace, or on the door of the Court House or

place in which the Court of General Sessions of the Peace of the County or District is usually holden; but nothing herein contained shall be taken to prevent an adjournment of the sale to a future day. Con. Rule 906.

882.—The advertisement in the *Ontario Gazette* of any lands for sale under a writ of *fiery facias*, during the currency of the writ (containing some reasonably definite description of the land), shall be deemed a sufficient commencement of the execution to enable the same to be completed by a sale and conveyance of the lands after the writ has become returnable. Con. Rule 907.

Further
proceedings
after execu-
tion against
lands is-
sued.

231. After an execution has issued against lands under the preceding section, no further proceedings shall be had in the Court from which the said execution issued, without either an order of the Judge, or unless the judgment creditor, his attorney or agent, shall make and file with the Clerk of the Court from which the said execution issued an affidavit stating, (1) That the judgment remains unsatisfied in whole or in part; (2) The amount, if any, which has been paid upon said judgment; (3) That execution against lands has been returned unsatisfied, or that he believes the judgment debtor has not sufficient lands in the County in which said execution against lands was issued to satisfy the said judgment. 57 V. c. 23, s. 8 (4).

An Affidavit.—The proceedings, as in the case of a transcript of judgment to another court under section 223, are stayed unless an order of the judge is obtained, or the execution creditor, his attorney, or agents makes and files with the clerk of the court an affidavit in the precise terms of the section. The provision is similar to that contained in section 223, except that this section makes no provision for subsequent proceedings in the court in which the judgment was obtained. But the jurisdiction of that court having been re-established, its machinery could be resorted to for the purpose of enforcing the judgment in the same way as if the execution against lands had not been issued.

See notes to section 230.

An Affidavit.—The affidavit must be made by the judgment creditor, his attorney or agent, and should state: (1) That the judgment remains unsatisfied in whole or in part; (2) The amount (if any) which has been paid thereon; (3) That the execution against lands has been returned unsatisfied, or that he believes the judgment debtor has no sufficient lands in the county in which such execution against lands was issued to satisfy the said judgment. The section makes no provision for subsequent proceedings as in section 223 sub-section (2). The affidavit may be entitled in the court in which judgment was originally obtained.

Fees on
writ against
lands.

232. On every writ of execution issued from a Division Court against lands, the Sheriff shall be entitled to the same fees as upon a writ of execution issued against lands and tenements from a County Court. 58 V. c. 14, s. 2.

County Court Fees.—The sheriff's fees and poundage are regulated by the County Court tariff.

233. On any execution against goods and chattels, the officer to whom the same is directed may seize and sell the interest or equity of redemption in any goods or chattels of the party against whom the writ has issued, and the sale shall convey whatever interest the mortgagor had in the goods and chattels at the time of the seizure. R.S.O. 1887, c. 51, s. 227.

The interest of a mortgagor in goods mortgaged may be sold in execution.

Equity of Redemption.—Compare R.S.O. c. 77, s. 17, in which the words "goods and chattels" are made to include leasehold interests in any lands, of the party against whom the writ has issued, and also shares and dividends of stockholders in any incorporated bank or other incorporated company in Ontario having transferable joint stock.

An equity of redemption must be sold as a whole; an equity of redemption on part of the property covered by a mortgage can neither be seized nor sold: *Gould v. Rich*, 4 Ch. Cham. 87. The equity of redemption could not be sold under an execution against the personal representative of a mortgagor: *Lowell v. Bank of Upper Canada*, 10 Gr. 57.

Upon the sale of the equity of redemption the goods themselves cannot be sold; the purchaser acquires only the right to stand in the position of the mortgagor: *Squair v. Fortune*, 18 U.C.R. 547.

Under an execution against the chattels of a mortgagor, the bailiff may seize the *corpus* of the mortgaged goods, so that he may expose them to view, although he can sell only the equity of redemption in them: see *Smith v. Cobourg and Peterborough Ry. Co.*, 3 P.R. 113; but see *Ex parte Miller*, *Re Miller v. Smith*, 34 N.B.R. 5. In *Watson v. Henderson*, 25 C.P. 562, *Adam Wilson, J.*, said: "The equity of redemption in goods may be seized while the debtor is in possession by an actual taking of the goods. Where the debtor is not in possession, but the mortgagee is so, by virtue of his title, the sheriff may do what is equivalent to a seizure just as he proceeds when he seizes bank or other stocks of the debtor." In *May v. Standard Fire Ins. Co.*, 30 C.P. 54, the same learned judge, then *Wilson, C.J.*, said: "The mortgagor and execution debtor was in actual possession at the time of the seizure, and I see no objection to the sheriff seizing them *in corpore* and taking them out of the debtor's possession, if need be, so long as he is not forbidden doing so by the mortgagee, if the mortgagee is entitled to immediate possession of the goods."

If the goods are in different counties the equity of redemption could not be sold: *Heward v. Wolfenden*, 14 Gr. 188. It will be noticed that the officer can sell only the mortgagor's interest "at the time of the seizure," and a *bona fide* sale of the equity of redemption after the delivery of the execution to the bailiff, but before seizure would defeat the execution: see *Pegge v. Metcalfe*, 3 U.C.L.J. 145; 5 Gr. 628; *Harrison's C.L.P. Act*, 1870, p. 366. The equity of redemption in a vessel cannot be seized: *Scott v. Carveth*, 20 U.C.R. 430.

234. Every Bailiff or officer having an execution against the goods and chattels of any person, may by virtue thereof seize and take any of the goods and chattels of such person, except those which are by law exempt from seizure, and may also seize and take any money or bank notes, and any

What may be seized under execution against goods and chattels.

cheques, bills of exchange, promissory notes, bonds, specialties or securities for money belonging to such person. R.S.O. 1887, c. 51, s. 228.

Goods Exigible Under Execution.—See notes to section 218. In view of the terms of this and the preceding section, it would seem that the provisions of sections 10-21 of the Execution Act, R.S.O. c. 77, are not applicable to Division Court executions: *Duggan v. Kitson*, 20 U.C.R. 316. Many things, therefore, which would be exigible under an execution from the High Court or County Court, cannot be dealt with by a Division Court bailiff.

The Goods Must Belong to the Debtor.—The goods must be the property of the judgment debtor, and if they belong to another person, although they may be in the possession, and under the apparent control of the judgment debtor, they are not liable to seizure on an execution against him: see *Ames-Holden Co. v. Hatfield*, 29 S.C.R. 95; *Dawson v. Wood*, 3 Taunt. 256; *Edwards v. Bridges*, 2 Stark. 396; *Lanyon v. Toogood*, 13 M. & W. 27. For instance, goods lent on hire cannot be taken for the debt of the hirer: *Dean v. Whittaker*, 1 C. & P. 347; nor the goods of a testator in the hands of his executor, on an execution against the latter: *Fan v. Newman*, 4 T.R. 621. And goods on which a party has a lien cannot be seized and sold under an execution against him: *Legg v. Evans*, 6 M. & W. 26.

Growing crops may be seized: *McDougall v. Waddell*, 28 C.P. 191; and see *Smith v. Union Bank*, 15 C.L.T. 15; but see *Rodwell v. Phillips*, 9 M. & W. 505.

Farm stock transferred by A. to B. on the terms that A. should be repaid by a greater number of the same kind at a certain time are, as well as the increase, liable to seizure under an execution against B. placed in the bailiff's hands before the specified time expired: see *Peers v. Carroll*, 19 U.C.R. 229; *South Australian Ins. Co. v. Randall*, L.R. 3 C.P. at p. 109; *Ex parte White*, L.R. 6 Ch. 397. Such a case is nothing less than a sale: see *South Australian Ins. Co. v. Randall*, L.R. 3 C.P. at p. 109; *Ex parte White*, L.R. 6 Ch. 397. But if merely lent this would not be so: *Dillaree v. Doyle*, 43 U.C.R. 442.

Tenant's fixtures may be seized and removed: *Grymes v. Bownen*, 6 Bing. 437; but fixtures in defendant's house and attached to the freehold cannot be seized: *Winn v. Ingilby*, 5 B. & Ald. 625; *Rogers v. Ontario Bank*, 21 O.R. 416; nor fixtures which have been wrongfully severed by a tenant: *Farrant v. Thompson*, 5 B. & Ald. 826.

If a person buy an article from a tradesman, and afterwards see another article of the same kind belonging to the tradesman which he prefers to the one purchased, and which he buys by delivering back the first one and paying an additional sum, but allows the article last purchased to remain an unreasonable time in the tradesman's possession, without registering a bill of sale, it is liable to seizure on an execution against the latter: *Carruthers v. Reynolds*, 12 C.P. 596.

Should a mare in foal be seized under an execution the right to the foal follow the dam: *Rogers v. Highlan*, Iowa Sup. Ch., 34 Alb. L.J. 397.

A pawnbroker's interest in redeemable pledges may be taken in execution, and the bailiff will be entitled to receive the money payable in redemption of the pledges and to sell the pledges when the pawnbroker might have done: *Re Rollason*, 34 Ch. D. 495.

Goods of Partners.—On an execution against one of two partners the defendant's interest in the goods of the partnership can be seized; but the right of property or possession of the other partner cannot be inter-

ferred with: Owens v. Ball, 1 A.R. 62; Harrison v. Harrison, 14 P.R. 436; McDonagh v. Jephson, 16 A.R. 107; and the purchaser would take the interest of the execution defendant as tenant-in-common of the goods: Eddie v. Davidson, 2 Doug. 650; Partridge v. McIntosh, 1 Gr. 50; Wilson v. Voght, 24 U.C.R. 635.

But the partner's interest in the goodwill, or book debts, incapable of seizure cannot be sold: Helmore v. Smith, 35 Ch. D. 436. "The unfortunate purchaser from the bailiff has to find out what he has really assigned to him and that he can only do by a partnership account:" *per* Lindley L.J., 35 Ch. D. 447.

An execution against a partner has no priority against his separate property over one against him as a member of the firm: Bank of Toronto v. Hall, 6 O.R. 653.

Joint Owners.—A half-interest in a chattel may be seized: Gunn v. Burgess, 5 O.R. 685.

Money.—Money made under an execution at the suit of one man cannot be retained to meet another execution in his hands against the same man: Sharp v. Leitch, 2 C.L.J. 132; Wood v. Wood, 12 L.J. Q.B. 141; Collingridge v. Paxton, 11 C.B. 683. Money in court cannot be seized: France v. Campbell, 6 Jur. 105; nor money in the hands of an auctioneer: Brown v. Perrot, 4 Beav. 585; nor other money held to the use of the debtor: Robinson v. Pearce, 7 Dowl. P.C. 93. Money deposited by a party privileged from arrest to secure his release by the sheriff who has taken him on a *ca. sa.* cannot be retained by the sheriff after a judge's order to refund has been made: Masters v. Stanley, 8 D.P.C. 169.

Moneys, securities for money and choses in action are only bound from the time of actual seizure by either the sheriff or the bailiff: McDowell v. McDowell, 10 U.C.L.J. 48.

PROPERTY NOT LIABLE TO SEIZURE.

Book debts cannot be seized under section 234: McNaughton v. Webster, 6 U.C.L.J. 17.

A license to sell liquor cannot be sold under an execution: *Re Gilmer*, 17 L.R. Ir. 1; nor a term of years: Duggan v. Kitson, 20 U.C.R. 316. Growing fruit, being part of the realty, cannot be seized: Rodwell v. Philips, 9 M. & W. 505.

Notwithstanding the wide terms of R.S.O. c. 77, section 10, it would seem that shares, etc., in companies cannot be seized under a Division Court execution:

The property in goods furnished by a manufacturer to a retail dealer under an agreement by which the latter was to devote his whole time to the business, to make monthly returns of sales on hand, and to remit monthly proceeds of sales, with certain deductions, was held to remain in the party supplying them, and that they were not liable to execution against the other party: Ames-Holden Co. v. Hatfield, 29 S.C.R. 95.

The following are the exemption clauses of chapter 77 of the R.S.O., and have reference to executions from Division Courts as well as other courts:

EXEMPTION.

[R.S.O. Cap. 77.]

"2. The following chattels shall be exempt from seizure under any writ, in respect of which this province has legislative authority, issued out of any court whatever in this province, namely:

"1. The bed, bedding and bedsteads (including a cradle), in ordinary use by the debtor and his family;

"2. The necessary and ordinary wearing apparel of the debtor and his family;

"One cooking stove with pipes and furnishings, one other heating stove with pipes, one crane and its appendages, one pair of andirons, one set of cooking utensils, one pair of tongs and shovel, one coal scuttle, one lamp, one table, six chairs, one washstand with furnishings, six towels, one looking-glass, one hair brush, one comb, one bureau, one clothes press, one clock, one carpet, one cupboard, one broom, twelve knives, twelve forks, twelve plates, twelve tea cups, twelve saucers, one sugar basin, one milk jug, one teapot, twelve spoons, two pails, one wash tub, one scrubbing brush, one blacking brush, one wash board, three smoothing irons, all spinning wheels and weaving looms in domestic use, one sewing machine and attachments in domestic use, thirty volumes of books, one axe, one saw, one gun, six traps, and such fishing nets and seines as are in common use, the articles in this sub-division enumerated, not exceeding in value the sum of \$150;

"4. All necessary fuel, meat, fish, flour and vegetables, actually provided for family use, not more than sufficient for the ordinary consumption of the debtor and his family for thirty days, and not exceeding in value the sum of \$40;

"One cow, six sheep, four hogs, and twelve hens, in all not exceeding the value of \$75, and food therefor for thirty days, and one dog;

"6. Tools and implements of or chattels ordinarily used in the debtor's occupation, to the value of \$100;

"7. Bees reared and kept in hives to the extent of fifteen hives.

"3. The debtor may in lieu of tools and implements of, or chattels ordinarily used in his occupation referred to in sub-division 6 of section 2 of this Act, elect to receive the proceeds of the sale thereof up to \$100, in which case the officer executing the writ shall pay the net proceeds of such sale if the same shall not exceed \$100, or, if the same shall exceed \$100, shall pay that sum to the debtor in satisfaction of the debtor's right to exemption under said sub-division 6, and the sum to which a debtor shall be entitled hereunder shall be exempt from attachment or seizure at the instance of a creditor.

"4. The chattels so exempt from seizure as against a debtor shall, after his death, be exempt from the claims of creditors of the deceased, and the widow shall be entitled to retain the exempted goods for the benefit of herself and the family of the debtor, or, if there is no widow, the family of the debtor shall be entitled to the exempted goods.

"5. The debtor, his widow or family, or, in the case of infants, their guardian, may select out of any larger number the several chattels exempt from seizure.

"6. Nothing herein contained shall exempt any article enumerated in sub-divisions 3, 4, 5, 6 and 7 of section 2 of this Act from seizure in satisfaction of a debt contracted for the identical article. R.S.O. 1877, c. 66, section 5.

"7. Notwithstanding anything contained in the next preceding sections, the various goods and chattels which were prior to the first day of October, 1887, liable to seizure in execution for debt shall, as respects debts which were contracted prior to the said day, remain liable to seizure and sale in execution, provided that the writ of execution under which they are seized has endorsed upon it a certificate signed by the judge of the court out of which the writ issues, if a Court of Record, or where the execution issues out of a Division Court, by the clerk of the

court, certifying that it is for the recovery of a debt contracted before the date hereinbefore mentioned."

A boat while in lawful use by the owner, though not a fisherman, is exempt: *Daragh v. Dunn*, 7 U.C.L.J. 273.

If goods exempt are seized and sold the execution creditor is not entitled to the money, but the execution debtor would be: *Michie v. Reynolds*, 24 U.C.R. 303.

A horse ordinarily used in the debtor's occupation not exceeding in value \$60 was held exempt from seizure under the original Exemption Act: *Davidson v. Reynolds*, 16 C.P. 140. But if worth more than \$60, it was not: *McMartin v. Hurlbart*, 2 A.R. 146. If worth not more than \$100, it would now be exempt.

Money received by a debtor from an insurance company by reason of a fire destroying exempted goods is exempt from garnishment: *Osler v. Muter*, 19 A.R. 94.

Wearing Apparel consists of that which is worn or made to be worn. Cloth actually appropriated thereto was held to be apparel: *Richardson v. Russell*, 10 Mete. 507; see also *Astor v. Merrett*, 111 U.S. 202, where "wearing apparel owned by a passenger in a condition to be worn at once without further manufacture" was held to be wearing apparel within the customs laws.

Tools and Implements.—"Tools" are mechanical instruments of any kind for working with. The term includes all instruments of manual operation, but particularly such as are used by farmers and mechanics: *Oliver v. White*, 18 S.C. 241.

"Implements" is used for things of necessary use in any trade or mystery which are employed in the practice of the said trade, or without which the work cannot be accomplished: *Terms de la Ley*, cited *Stroud*, 462.

"Implements of trade" are those implements used in a man's trade or business. It has been held that the expression "implements of a debtor's trade" refers to the business of a mechanic, as a carpenter, blacksmith, silversmith, printer or the like: *Attwood v. DeForest*, 19 Conn. 517. But the words used in our Act have a wider significance: "Tools and implements of, or *chattels* ordinarily used in the debtor's occupation" would cover any business and profession as well as a mechanical occupation.

A music teacher's piano has been held in the U.S. to be an instrument of business: *Amend v. Murphy*, 69 Ill. 338.

A steam engine used for working a threshing machine was held to be an instrument of husbandry: *R. v. Maltby*, 8 E. & B. 712.

An execution debtor can do as he pleases with the statutory exemptions, and his execution creditor cannot take advantage of the fact that they are insufficiently described in a bill of sale thereof by the execution debtor: *Field v. Hart*, 22 A.R. 449.

Where, in an interpleader issue, the claimant alleges that the goods seized include statutory exemptions, it is a question for trial in the issue and not to be left for the sheriff to deal with: *Id.*

Tools and implements ordinarily used in the debtor's occupation are not exempt after he has changed that occupation to one in which such tools are not ordinarily used: *Wright v. Hollingshead*, 23 A.R. 1.

Goods exempt from seizure under execution are not liable to seizure under an attachment. R.S.O. c. 79, s. 4 (2).

It is not a fraudulent preference for a debtor to hand over the exemptions to a creditor: *Temperance Ins. Co. v. Coombe*, 28 C.L.J. 88. If the bailiff should sell the exemptions, the proceeds could be recovered from him by the debtor or other person entitled: *Michie v. Reynolds*, 24 U.C.R. 303.

Costs.—A plaintiff who has recovered a judgment for debt and costs, and has received the debt out of court, is entitled to have execution for costs, and a *mandamus* would be granted to the clerk to compel its issue: *R. v. Fletcher*, 2 E. & B. 279; *Re Linden v. Buchanan*, 29 U.C.R.I.

As to costs where judge has no jurisdiction, see section 207, s-s. (2), and notes thereto.

Creditors' Relief Act.—R.S.O. c. 78, contains some important provisions affecting the rights of the plaintiff under executions. By that Act the priority among creditors by execution from the High Court and County Courts is abolished. If an execution has issued from one of these courts, and a sheriff has levied upon the debtor's goods by selling the same, all creditors who within one month from the time of entry of notice of the levy by the sheriff in a book kept in his office for that purpose, are entitled to share ratably in the proceeds, subject to the payment of the costs of the creditor under whose writ the amount was made. During the month other creditors may either lodge their executions with the sheriff, or may file with him certificates of a County Court clerk of their claims, which certificates have the same effect, as to levies made by the sheriff, as executions.

Provisions are made by the Act for contesting claims both by the debtor and by other creditors. Other creditors cannot, however, raise any defence not going to the *bona fides* of the claim: *Bowerman v. Phillips*, 15 A.R. 679. The following are the more important provisions affecting Division Courts:

14. A creditor who has recovered a judgment in a Division Court against the debtor may serve upon the sheriff a memorandum of the amount of his judgment and of the costs to which he is entitled, under the hand of the clerk and the seal of the Division Court: and the memorandum so served shall have the same effect for the purposes of this Act as if the creditor had delivered to the sheriff a writ of execution directed to the said sheriff from a County Court.

A debtor notwithstanding the Creditor's Relief Act may specifically pay off an execution, and the money will not be distributable among all creditors. So, also, may a mortgagee whose mortgage intervenes between the first and second executions: *Davies Brewing & Malting Co. v. Smith*, 10 P.R. 627. But not one execution out of two or more: *Re Young v. Ward*, 27 O.R. 588.

Where an interpleader issue is directed, only those creditors who are parties thereto, or whose rights are secured by the interpleader order, share in the benefits: R.S.O. c. 78, s. 4, s-s. 4; *Reid v. Gowans*, 13 A.R. 501; *Bank of Hamilton v. Durrell*, 15 A.R. 500; but not if the claimant abandons: *Wait v. Sager*, 14 P.R. 347.

The Act does not alter the legal effect of executions, nor give to firm or separate creditors of a partnership any different rights from those they had before: *McDonagh v. Jephson*, 16 A.R. 107.

After the sheriff had been served with a memorandum from a Division Court, the Division Court creditor would, perhaps, be entitled to share in moneys realized from lands, if the goods were insufficient: *Harvey v. McNeil*, 12 P.R. 362; *Re Bokstal*, 17 P.R. 201.

25. (1) If the sheriff does not find property of a debtor leviable under executions and claims in his hands sufficient to pay the same in full,

and the sheriff finds goods and chattels in the hands of the bailiff of a Division Court under a writ of execution or attachment against the debtor, the sheriff shall demand and obtain the goods and chattels from the bailiff, who shall forthwith deliver the same to the sheriff, with a copy of every writ of execution in his hands against the debtor, and a memorandum showing the amount to be levied thereunder, including the bailiff's fees so far as proceedings have been taken by him, and showing the date upon which each writ was received by him.

(2) In case the bailiff fails to deliver any of the goods, he shall pay double the value of the property retained, such double value to be recovered by the sheriff from the bailiff with costs of suit, and to be by the sheriff accounted for as part of the estate of the debtor.

(3) The costs and disbursements of the bailiff shall be a first charge upon the goods and shall be paid by the sheriff to the bailiff upon demand, after being taxed by the Division Court clerk. 52 V. c. 7, s. 7, part.

(4) The sheriff shall distribute the proceeds among the creditors under the provisions of this Act, and the Division Court execution creditors shall be entitled, without further proof, to stand in the same position as execution creditors whose writs are in the sheriff's hands.

No lien upon the goods is given to the bailiff for his fees. Contrast section 241 and see notes thereto. But the fees are a first charge upon the goods, and are to be paid by the sheriff on demand after taxation.

The bailiff must deliver the goods *forthwith*, and he is only entitled to the fees up to the time of demand: *Re Harrison, Ex parte Sheriff of Essex*, (1893) 2 Q.B. 111; and he is not entitled to poundage; *Re Thomas, Ex parte Sheriff of Middlesex*, (1899) 1 Q.B. 66, affirmed on appeal, (1899) 1 Q.B. 460; *Re Ludmore*, 13 Q.B.D. 417. See notes to section 239, *infra* p. 416.

If the goods are claimed by a third party, the right of the bailiff to fees would depend upon whether the goods belonged to the debtor or the third party: *Newman v. Merriman*, 26 L.T. 397; see *Thomas v. Peck*, 20 Q.B.D. 727; and it would be only right that the clerk should not tax them until the claim had been adjudicated upon.

The Creditor's Relief Act applies to moneys received by the sheriff upon a Division Court execution against land: *Re Young v. Ward*, 27 O.R. 588.

As to enforcing claims under the Creditor's Relief Act, see section 224 and notes thereto, and Rule 133, *ante* p. 390.

As to executions against lands, see section 230.

A bailiff would be a trespasser who seized and took any of the goods and chattels of the person against whom he had an execution which were by law exempt from seizure: see *Re Gould v. Hope*, 21 O.R. 624; *Bagge v. Whitehead*, (1892) 2 Q.B. 355; 20 A.R. 347.

Securities for Money.—At common law bank notes or the securities mentioned in this section were exempt, but for Division Court purposes they are here made the subject of seizure.

This power only applies to moneys set apart and ear-marked: *Wood v. Wood*, 4 Q.B. 397. Money seized under an execution is exactly in the same position as money the proceeds of goods sold: *Collingridge v. Paxton*, 11 C.B. 683. Cheques were held to be seizable though in the hands of another, *e.g.*, the Accountant-General of the Court of Chancery: *Watts v. Jefferys*, 3 Mac. & G. 422. So also is a policy of life assurance: *Stokoe v. Cowan*, 30 L.J. Ch. 882. Any title deed, even if pledged with the debtor for a loan, or a letter or a guarantee for some collateral act, or any other deed or writing, which could not form the foundation of an action by the debtor himself for a specific sum of money, cannot be taken. But it would seem that all instruments containing an uncon-

ditional covenant or agreement for payment of a specific sum of money to the execution debtor for his own benefit are within the words "other securities for money," and may be taken: Arch. Prae. 12th ed. 653. The word "money," here used means specific gold and silver coin, bank or government notes, and not debts due to the defendant: *Harrison v. Paynter*, 6 M. & W. 387. A surplus in the bailiff's hands, after satisfying a former execution, even at the suit of the same plaintiff, cannot be seized as money: *Harrison v. Paynter*, *supra*; *Fieldhouse v. Croft*, 4 East, 510; *Sharpe v. Leitch*, 2 C.L.J. 132; contrast R.S.O. c. 77, s. 18, which applies only to executions from the High Court and County Court. Nor would such money be stayed in the bailiff's hands to satisfy a present execution: *Willows v. Bull*, 2 N.R. 376. Garnishment would be the remedy in that case: *Lockart v. Gray*, 2 C.L.J. 163. Money in the hands of a third person as trustee for the defendant cannot be seized unless it be the exact pieces of coin or paper of the defendant: *Robinson v. Piece*, 7 Dowl. 93; *Wood v. Wood*, 4 Q.B. 397; but see, *per Osler, J.A.*, *Sullivan v. Francis*, 18 A.R. 121, 126, where it is said that a surplus after paying a landlord and mortgagee would be subject to the execution. No money deposited in court in one action cannot, when the defendant is entitled to have it paid out to him, be paid out to an execution creditor in a second action: *France v. Campbell*, 9 Dowl. 914; 6 Jur. 195, s.c. It would seem that money in a defendant's pocket no more than clothes on his back can be seized on execution: see *Sunbolf v. Alford*, 3 M. & W. 248. Books of account cannot be seized: *McNaughton v. Webster*, 6 U.C.L.J. 17. A money bond for the conveyance of land is seizable by a bailiff: *R. v. Potter*, 10 C.P. 39. So also is a fire policy after a loss has taken place and money has become payable thereon, even though the amount has not been ascertained: *The Bank of Montreal v. McFavish*, 13 Gr. 395. A license to sell liquors would not be exigible: *Re Gilmer*, 17 L.R. Ir. 1. The property mentioned in the latter part of this section is only bound from the seizure: *McDowel v. McDowell*, 10 U.C.L.J. 48; see also notes to section 218.

Where a mortgage of land registered under the Land Titles Act is seized, the bailiff must lodge with the Master of Titles a certificate of the seizure: R.S.O. c. 138, s. 66. The bailiff cannot sell any security seized by him: *Rumohr v. Marx*, 2 C.L.T. 501; see as to powers of a sheriff, under an order against an absconding debtor, R.S.O. c. 79, ss. 16.

Bailiff to hold cheques, notes, etc., seized under execution for benefit of plaintiff.

235. The Bailiff shall for the benefit of the plaintiff, hold any cheques, bills of exchange, promissory notes, bonds, specialties, or other securities for money so seized or taken as aforesaid, as security for the amount directed to be levied by the execution, or so much thereof as has not been otherwise levied or raised, and the plaintiff, when the time of payment thereof has arrived, may sue in the name of the defendant, or in the name of any person in whose name the defendant might have sued, for the recovery of the sum or sums secured or made payable thereby. R.S.O. 1887, c. 51, s. 229.

For the Benefit of the Plaintiff.—The "plaintiff" here means the execution creditor. According to the ordinary rules of statutory construction and the Interpretation Act, and the word "defendant" could be read for the word "plaintiff" should the former be the execution creditor: see clause (10), Rule 2.

Bailiff to Hold Securities.—After the bailiff has made the seizure, it would be advisable for him carefully to prepare a list of the securities

seized, showing their amounts, dates, when and by whom payable, and to give notices to the different persons liable on them of such seizure. He should also advise the execution creditor of what he has done, so that he might better determine whether he would proceed on them or not. As regards such securities as might not be due, their deposit in the clerk's safe, or some other safe depository, would be a prudent course for the bailiff to take. If the execution creditor should not within a reasonable time determine to take proceedings upon those overdue, and the others as they become due, it would be the duty of the bailiff to hand them back to the debtor, for should he be negligent in that respect, and the debts due upon such securities be barred by the Statute of Limitations, or lost otherwise, the bailiff and his sureties would undoubtedly be liable. Should the execution creditor's claim and all costs be satisfied out of the proceeds of the securities seized, or discharged in any other manner, it would then also be the duty of the bailiff to restore such of the securities as remained in his hands to the execution debtor. Bank stock could not be considered "money," or "other securities for money," within the meaning of this and the next preceding section: *Ogle v. Knipe*, L.R. 8 Eq. 434. Neither would shares in a building society or other corporation: *Collins v. Collins*, L.R. 12 Eq. 455. On this section generally, see 1 U.C.L.J. 181 and 182; *Hopkins v. Abbott*, L.R. 19 Eq. 222.

May Sue in the Name of the Defendant.—As to the notice that should be added to the summons, see Rule 13. The action must be brought in the name of the defendant in the original suit, or in the name of any person in whose name the defendant might have sued: see 4 U.C.L.J. 226. If questioned, the proceedings justifying the action might have to be proved: *McDonald v. McDonald*, 21 U.C.R. 52. A defendant could not set up matters that occurred subsequently to the seizure and notice: *Dennison v. Knox*, 24 U.C.R. 119; *Jeffs v. Day*, L.R. 1 Q.B. 372; *Watson v. Mid Wales Railway Co.*, L.R. 2 C.P. 593; *Brighton Arcade Co. v. Dowling*, L.R. 3 C.P. 175; *Chishom v. Provincial Ins. Co.*, 20 C.P. 11; *DePothonier v. DeMattos*, E. B. & E. 461; *Wilson v. Gabriel*, 4 B. & S. 243.

The suit would be subject to all the equities between the execution debtor and the defendant: *Re Natal Inv. Co.*, L.R. 3 Ch. 355; *Rodger v. The Comptoir D'Eseompte De Paris*, L.R. 2 P.C. 393.

The proceedings under this section may be by "ordinary summons" or "special summons," and at the end of the particulars or in addition to the notices or warnings on the summons, the notices and warnings set forth in Form 52 shall be given: Rule 13.

The nominal plaintiff has no power to discharge the suit: section 236.

See notes to section 44.

236. The defendant in the original cause shall not discharge such action in any way without the consent of the plaintiff or of the Judge. R.S.O. 1887, c. 51, s. 230.

Shall not Discharge Such Action.—See notes to section 235. A discharge given after seizure and notice would be set aside as a fraud: *Sargent v. Wedlake*, 11 C.B. 732; *Ex parte Games*, 3 H. & C., 294; *Kawstorne v. Gandell*, 5 M. & W. 304; *Clay v. Gill*, 12 Man. L.R. 465.

This section preserves to the execution creditor the benefit of the seizure by preventing the discharge of such action which might in any way be obtained without his consent or that of the judge. His rights shall, therefore, stand as they existed at the time of the seizure, and no act of the execution debtor shall in any way prejudice them. It is sub-

Defendant
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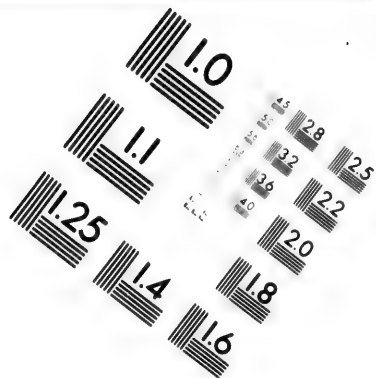
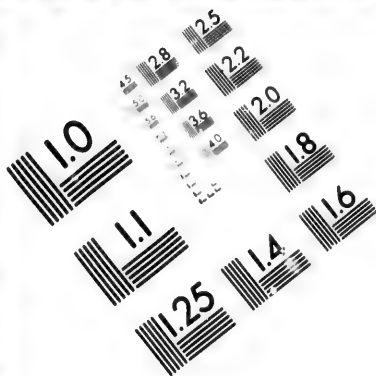
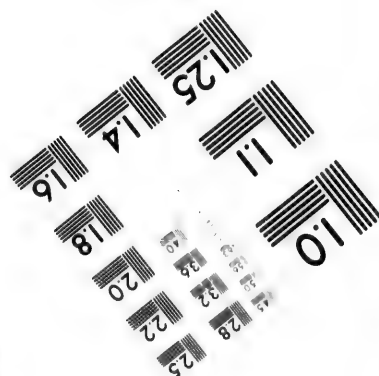
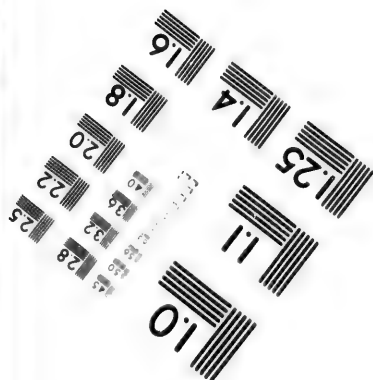
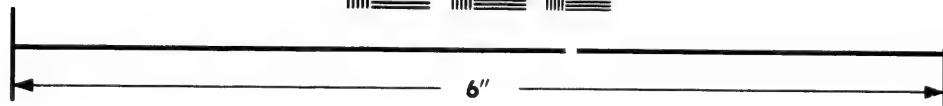
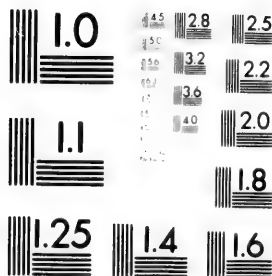


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mitted that the execution creditor will be much in the same position as an assignee of a chose in action would be in after he had given notice to the debtor of the assignment to him.

Party enforcing securities seized must secure costs.

237. The party who desires to enforce payment of a security seized or taken as aforesaid, shall first pay or secure all costs that may attend the proceedings; and the moneys realized, or a sufficient part thereof, shall be paid over by the officer receiving the same to apply on the plaintiff's demand, and the overplus, if any, shall be forthwith paid to the defendant in the original action, under the direction of the Judge. R.S.O. 1887, c. 51, s. 231.

Pay or Secure all Costs.—This is declaratory merely: *Auster v. Holland*, 3 D. & L. 740; *Spicer v. Todd*, 1 Dowl. 306; *De Colyar on Guarantees*, 2nd ed. 48.

The Overplus.—If more is realized than sufficient to pay the execution debt, the overplus, if any, must be paid forthwith to the defendant in the original action under the direction of the judge; his order must be first obtained.

It was held that "overplus" as used in 2 W. & M. Sess. 1 c. 5, s. 2, means what remains after payment of the rent and reasonable charges of distress: *Lyon v. Tomkins*, 1 M. & W. 602; *Knight v. Egerton*, 7 Ex. 407; *Stroud* 554.

EXECUTIONS AGAINST SHAREHOLDERS IN JOINT STOCK COMPANIES.

Judgment Against Joint Stock Companies.—When a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recovered against such company, or against a public officer or other persons representing such company, the party alleging himself to be entitled to execution must apply on affidavit to the judge for leave to issue execution accordingly. The judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any action may be tried; and in either case such judge may impose such terms as to costs or otherwise as shall be just. No order to issue execution shall be made under this rule *Ex parte*, but only after at least three days' notice to the party against whom it is sought to issue execution, unless under special circumstances the judge shall otherwise order: Rule 140 (d).

Where a judgment is recovered against a joint stock company, and an execution against the company has been returned unsatisfied, in whole or in part, the amount due on such execution, but not beyond the amount unpaid by any shareholder on his stock, is recoverable with costs against such shareholder: R.S.O. c. 191 s. 37; R.S.C. c. 119 s. 55; *Brice v. Munro*, 12 A.R. 453. Directors are also liable for wages in certain cases: R.S.C. c. 119, s. 60; R.S.O. c. 191, s. 85.

Hitherto it has been necessary to enforce this liability by separate action or writ of *scire facias*: see *Lindley on Companies*, 280. The plaintiff may select any shareholder or shareholders he pleases, and cannot be restrained in his selection provided he acts *bona fide* for the purpose of obtaining payment of what is due to him: *Lindley on Companies*, 282. Fraud of a shareholder by the directors, in which the judgment creditor took no part, would afford no defence to the proceedings against the shareholder under this rule: *Henderson v. Royal British Bank*, 7 E. & B. 356.

238. The Bailiff, after seizing goods and chattels by virtue of an execution, shall indorse on the execution the date of the seizure, and shall immediately, and at least eight days before the time appointed for the sale, give public notice by advertisement signed by himself, and put up at three of the most public places in the division where the goods and chattels have been taken, of the time and place within the division when and where they will be exposed to sale; and the notice shall describe the goods and chattels taken. R.S.O. 1887, c. 51, s. 232.

Bailiff after seizure of goods to indorse date of seizure and give notice of sale.

After Seizure.—See notes to section 218, and especially *Gladstone v. Padwick*, L.R. 6 Ex. 203. See also *Hineks v. Sowerby*, 4 A.R. 113; *Whimsell v. Giffard*, 3 O.R. 1, and cases there cited. Under Rule 188, the bailiff is required to endorse the day and hour when he receives such execution.

Date of Seizure.—See also notes to section 218. It is best to endorse not only the day of the month, but the hour of the day on the execution.

At Least Eight Days.—This means clear days, *i.e.*, excluding the day of posting the advertisement, as well as the day of the sale: see note to section 100, p. 158 *ante*.

The advertisement should be put up immediately after the seizure: see note to section 90, *ante* p. 147, and to section 117, *ante* p. 206.

Three Most Public Places.—The policy of the law is to realize as much as possible out of the defendant's goods; and for that reason, the statute prescribes the most public form of advertisement.

Notice of Sale.—Any irregularity in the publication of the notice, or even the absence of notice, would not invalidate the sale, provided it was honestly conducted in other respects; but it would subject the bailiff to an action: *Campbell v. Coulthard*, 25 U.C.R. 621; *Paterson v. Todd*, 24 U.C.R. 296; *McDonald v. Cameron*, 13 Gr. 84; *Shultz v. Reddick*, 43 U.C.R. 155; *Trent v. Hunt*, 9 Ex. 14; see section 297.

The notice must be signed by the bailiff himself to be in strict conformity with the section.

Even a lithographed signature would be insufficient: *R. v. Cowper*, 24 Q.B.D. 60, 533; and it is submitted that a signature by a clerk or assistant would not be in conformity with the section: *Monks v. Jackson*, 1 C.P.D. 683; *R. v. Jones*, 23 Q.B.D. 29; see, however, *France v. Dutton*, (1891) 2 Q.B. 208.

A failure to comply with the provisions would not, however, involve any serious consequences, unless, perhaps, it could be shown that by reason of the absence of the signature, the sale was considered fictitious, and buyers did not, therefore, attend.

The notice should be of such a character as to give intending purchasers and others reasonable information of what is to be sold, and of the time and place of sale. See notes to section 230, *ante* p. 399.

For form of notice of sale see Form 234.

239. The goods so taken shall not be sold until the expiration of eight days at least next after the seizure thereof, unless upon the request in writing under the hand of the party whose goods have been seized. R.S.O. 1887, c. 51, s. 233.

Goods not to be sold till eight days after seizure.

Shall Not be Sold Until the Expiration of Eight Days.—If sold before the eight days, the sale would not be void, but only irregular; see notes to section 238. But if the debtor suffered any damage in consequence, the bailiff and his sureties would be responsible: *Schultz v. Reddick*, 43 U.C.R. 155, 161.

The measure of damages would be the real value of the goods, less the amount of execution: *Ib.*

Pending the sale, the goods are at the risk of the bailiff. "If the sheriff seize goods he is liable for them, no matter what becomes of them, and whether he sells or not the judgment debtor, after the seizure, is discharged as to the plaintiff, and he is not liable to a second execution and he may plead the taking in discharge of himself:" *Bac. Abr. Execution (D)*; *Clerk v. Withers*, 2 Ld. Raymd. 1074; *Ross v. Grange*, 25 U.C.R. 396.

Any person who takes, or causes to be taken, without lawful authority, goods under seizure, is guilty of felony: *Criminal Code*, (1892) s. 106.

Request in Writing.—In view of the positive prohibition contained in the section, it is doubtful if a sale could take place without a written consent. Ordinarily a person may waive a provision intended for his benefit, and such waiver may be in writing or by words or conduct: *Girvin v. Burke*, 19 O.R. 204. In this case the statute expressly provides that the waiver must be in writing. A mere submission to the injury, or a voluntary promise, after the sale, not to seek redress, would be insufficient. After the injury had been committed, a release, or accord and satisfaction, would have to be shown: *per Thesiger, L.J.*, *De Busche v. Alt*, 8 Ch. D. at p. 314.

The bailiff should stop the sale as soon as sufficient money is raised: *Cook v. Palmer*, 6 B. & C. 739.

The sale is for ready money and immediate delivery, and the bailiff is not justified, after he has sold as much as will apparently satisfy the execution, in selling more, on the speculation that the actual delivery of the goods sold may be prevented by loss or accident: *Aldred v. Constable*, 6 Q.B. 370.

The goods must be sold within a reasonable time or an action by the creditor will lie: *Bales v. Wingfield*, 2 N. & M. 831; *Jacobs v. Humphrey*, 2 C. & M. 413.

The sale need not be by public auction; but it seems the bailiff must bear any expense in selling in any other way: *Phillips v. Canterbury*, 11 M. & W. 619.

The bailiff must not sell goods for much below their real value: *Keightley v. Birch*, 3 Camp. 521.

Should an execution, in the meantime, have issued to the sheriff, he would be entitled, under R.S.O. c. 78, section 25, to demand the goods, and the bailiff would be bound to deliver them; but would then, under sub-section 3, be entitled to have his fees taxed by the clerk and paid by the sheriff on demand; but these fees would not include poundage: see notes to section 234, *ante* p. 411. If no demand was made for the goods, the bailiff might sell them; *Woolford's Estate (Trustee of) v. Levy* (1892), 1 Q.B. 772.

Should the execution debtors be a company any execution put in force after the making of a winding up order would be void: R.S.C. c. 129, section 17; and after a resolution or order for winding up by the members under R.S.O. c. 183, and amendments, the remedy for a debt is not by seizure, but by an order on petition to the County Court: R.S.O. c. 222, section 19, sub-section 7: see *Westbury v. Twigg* (1892) 1 Q.B. 77; *Re Hille India Rubber Co.*, W.N. (1897) 20.

As to execution against the shareholders of a joint stock company: see notes to section 237, at p. 414.

Proceedings When Goods Not Sold.—In case the bailiff has offered the property for sale (after duly advertising it) without being able to either effect a sale or to realize a reasonable amount therefor, he must not sacrifice the property, but must offer it for sale again if within thirty days, and if after thirty days, and the execution has not been renewed, the execution must be returned property in hand for want of buyers: and if the execution is returned property in hand for want of buyers after the thirty days it cannot be renewed, but another process must issue directing the bailiff to sell the property for what it will bring: Rule 185 (b) (c). See Form No. 155.

Return to the Clerk of Money Realized.—The whole money realized including debt, damages, costs, interest and bailiff's fees and poundage (except disbursements) must be paid over by the bailiff to the clerk, who after taxing the bailiff's fees and charges must pay to the bailiff his proper taxable fees, duly returned according to law and none others: Rule 155 (d). The bailiff cannot set off against the money he receives any sum due to him by the clerk for fees or costs: see Rule 164.

The money must be paid over to the clerk immediately after its receipt otherwise the bailiff will be subjected to the loss of his office: Rule 186.

240. No Clerk, Bailiff or other officer of a Division Court shall, directly or indirectly, purchase any goods or chattels at any sale made by any Division Court Bailiff under execution, and every such purchase shall be absolutely void. R.S.O. 1887, c. 51, s. 234. [See also *Cap. 17, sec. 35.*]

Bailiff and other officers not to purchase goods seized.

Directly or Indirectly Purchase.—This section is only declaratory of the common law. No person who has, as a public officer, the sale of any goods or chattels, could either directly or indirectly be the purchaser thereof. The bailiff is in the position of a trustee, and it would never do to allow selfish interest to conflict with public duty: see *King v. England*, 4 B. & S. 782; *Williams v. Grey*, 23 C.P. 561; *Gastonguay v. Savoie*, 29 S.C.R. 613; see also section 62: Rules 196-197. The words, "directly or indirectly," used here mean either by himself or some secret agent on his behalf. It has been held that the addition or omission of these words to an offence were immaterial: *Todd v. Robinson*, 14 Q.B.D. 739, at p. 746; but see *Stewart v. Macdonald*, 11 C.L.J. 19.

The sale to an officer, or to a person for him, is void, and passes no property; and the debtor would be entitled to maintain replevin or trover against the party in possession of the goods: *Cundy v. Lindsay*, 3 App. Cas. 459.

The execution debtor might also, perhaps, maintain an action against the officer and his sureties for misconduct, and recover any expenses he had been put to in recovering the goods: see *Mayor of Salford v. Lever*, 25 Q.B.D. 363; (1891) 1 Q.B. 168.

Under R.S.O. c. 17, s. 35, the sheriff and his officers, including constables, are prohibited from purchasing any goods or lands exposed for sale under execution.

Bailiff's Return.—The bailiff is required to return an execution within thirty days: section 227; unless renewed or unless a seizure has been made: Rule 185 (a). The whole money for debt or damages, costs, interest, bailiff's fees and percentage (but not disbursement), must be paid over by the bailiff to the clerk from whom he received the execution:

Rule 185 (d); and the money must be so paid over immediately: Rule 186. In addition to the formal return the bailiff must also endorse on this execution a correct and full statement of the particulars *in detail* of all his charges made for fees and disbursements in the execution thereof: Rule 188. For forms of return see Forms 235 to 238: see notes to section 218.

Right of
bailiff to
fees on
executions,
etc., when
action
settled or
assignment
made.

241. Where in any Division Court action a Bailiff has seized goods under and by virtue of a writ of execution or attachment, and the action is afterwards settled between the parties thereto, or the defendant in the action makes an assignment for the general benefit of his creditors, the said Bailiff shall, until his fees and disbursements upon the said writ are fully paid and satisfied, have a lien therefor upon so much of the said goods as will reasonably satisfy the same, but in the event of a dispute as to the proper amount of said fees and disbursements, the amount claimed therefor may be paid into Court until the proper amount shall be certified by the Judge, and on such payment into Court the said lien shall cease and determine. 52 V. c. 12, s. 2.

A Lien Therefor.—This section provides for two cases: (1) settlement; (2) assignment for benefit of creditors.

The bailiff must first make an effective seizure, which becomes inoperative by the settlement or assignment. The assignment must, it is submitted, be under R.S.O. c. 147, which takes precedence over executions.

No power is given to the bailiff to sell for the realization of his lien, and without such a provision the bailiff would have no lien: *Sneary v. Abdy*, 1 Ex. D. 297; *Re Ross*, 3 P.R. 394; *Re Ludmore*, 13 Q.B.D. 415; *Re Wells & Croft*, 68 L.T. 231; *Re Harrison*, (1893), 2 Q.B. 111; *Re Thomas*, (1899) 1 Q.B. 66, 460; and the creditor could not add the cost of execution or bailiff's fees to his debt: *Marquis of Salisbury v. Ray*, 8 C.B.N.S. 193; *Re Long, Ex parte Cuddeford*, 20 Q.B.D. 316. Three per cent. would be allowable to the bailiff under the tariff in case of settlement, but nothing on an assignment: *Re Ludmore*, 13 Q.B.D. 417. A sheriff is in a better position under C.R. 1190: *Smith v. Antipitzky*, 10 C.L.T. 368.

DEATH, ETC., OF BAILIFF WHILE EXECUTION OR ATTACHMENT UNEXECUTED.

Continuation of proceedings after death of bailiff.

242. In the event of the death, resignation or removal from office of a Bailiff of a Division Court, after action taken by him under any writ of execution or warrant of attachment as Bailiff, the proceedings may be continued by the Bailiff, his successor, and in his own name, as fully and effectually as if such action had been so taken by himself: the benefit of all sureties given to the Bailiff in his official capacity shall inure to his successor in office. 60 V. c. 14, s. 16.

EXAMINATION OF JUDGMENT DEBTORS.

243.—(1) A party having an unsatisfied judgment or order in a Division Court, for the payment of any debt, damages or costs, may procure from the Court wherein the judgment has been obtained, if the defendant resides or carries on his business within the County in which the Division is situate, or from any Division Court into which the judgment has been removed under section 223 of this Act and within the limits of which Division Court the defendant resides or carries on his business, a summons in the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts, and the summons shall be served personally upon the person to whom the same is directed, requiring him to appear at a time and place therein expressed, to answer such things as are therein named, and if the defendant appears in pursuance thereof, he may be examined upon oath touching his estate and effects, and the manner and circumstances under which he contracted the debt or incurred the damages or liability, which formed the subject of the action and as to the means and expectation he then had, and as to the property and means he still has of discharging the debt, damages or liability, and as to the disposal he has made of any property: Provided, nevertheless, that before the summons shall issue, the plaintiff, his solicitor or agent, shall make and file with the Clerk of the Court from which the summons may issue an affidavit stating,

Judgment debtors may be examined at the instance of their creditors.

Affidavit required before judgment summons.

(a) That the judgment remains unsatisfied in the whole or in part;

(b) That the deponent believes that the defendant sought to be examined is able to pay the amount due in respect of the judgment or some part thereof; or,

(c) That the defendant sought to be examined has rendered himself liable to be committed to gaol under this Act. R.S.O. 1887, c. 51, s. 235; 57 V. c. 23, s. 15.

(2) The person obtaining the summons and all witnesses whom the Judge thinks requisite, may be examined upon oath, touching the inquiries authorized to be made as aforesaid. R.S.O. 1887, c. 51, s. 236.

Examination of witnesses.

Examination of a Judgment Debtor.—This section having been taken originally from the English statute, 9 & 10 Vic. c. 95, s. 98, the cases upon that statute are applicable. The right to commit a judgment debtor, in the English County Court, is now governed by The Debtors' Act, 1869, 32 & 33 Vic. c. 62, ss. 4, 5.

Process in Nature of Execution.—At the present time a controversy exists as to whether an order made under the judgment summons provisions of the Act is process for contempt or in the nature of execution or limited or qualified execution. The cases of *Ex parte Dakins*, 16 C.B. 77; *Re Ryley*, 15 Q.B.D. 329; *Re McLeod v. Emigh*, 12 P.R. 450 and *Reid v. Graham Bros.*, 26 O.R. 126, support the proposition that the process is merely in the nature of execution and, therefore, that when execution may issue against a defendant personally, the provisions have no application. Payment of the debt will entitle a defendant to be relieved from an order for committal: section 251; Rule 206. In *Davis v. Fletcher*, 2 E. & B. 271, the failure to appear was held to be misconduct amounting to contempt, and it was said that a commitment on that ground was very different from an execution or attachment for not paying money; and in *Mitchell v. Simpson*, 23 Q.B.D. 373, Charles, J., said that a commitment might be primitive in its character although it could be got rid of by a money payment; see also *Morris v. Ingram*, 13 Ch. D. 338; *Re Wray*, 36 Ch. D. 138; *per Boyd, C.*, in *Re Teasdale v. Brady*, 18 P.R. 104, who inclined to this view and refused to order the discharge of a married woman against whom an order of commitment had been made on a personal judgment for an anti nuptial debt.

Who May be Examined as a Judgment Debtor.—The introductory words of the section seem to be wide enough to include any person against whom there may exist an unsatisfied judgment or order for the payment of "any debt, damages, or costs." But the words "defendant," occurring almost immediately after, has been thought to restrict the provisions of the section, so that a garnishee was held not to be included in the term: *Hanna v. Coulson*, 23 O.R. 493; 21 A.R. 692, although by Rule 2 (12) it is declared that the word "defendant" shall include every person served with any writ of summons or process, or served with a notice of or entitled to attend any proceedings, and by Rule 2 (15) the word "process" is made to include any summons, writ, or warrant issued under the seal of the court, or a judge's summons or order: see also *Cowan v. Carlill*, 52 L.T. 431, cited *ante*, p. 337. The right to examine a garnishee under sections 243 to 254 inclusive is now expressly conferred by section 255, introduced in 1895 by 57 Vic. c. 23, s. 18; but not the right of commitment: *Re Dowler v. Duffy*, 29 O.R. 40; nor the right to order payment by instalments: *Ib.*

An assignee having an unsatisfied judgment would not be entitled to issue a judgment summons without reviving under Rule 140: *East End Buildg. Socy. v. Slack*, 60 L.J.Q.B. 359.

The section would appear to authorize the examination of a defendant against whom there is an unsatisfied judgment for costs only. But not an unsuccessful plaintiff: *Meyers v. Kendrick*, 9 P.R. 363; *Troutman v. Fiskin*, 13 P.R. 153. But see notes *infra*, p. 423. A consular agent of the United States was held liable to examination under this section: *Detroit Soap Co. v. Thratcher*, 15 C.L.T. 161.

Partners.—On a judgment against a firm, only persons who are in fact partners, are liable, and no right exists to examine a person who might have been made liable by holding himself out as a partner: *Re Young v. Parker & Co.*, 12 P.R. 646; nor can a judgment summons issue against a partner who has not been served with process: *Reid v. Graham Bros.*, 25 O.R. 573, affirmed 26 O.R. 126; notes to section 112, *ante*, p. 184.

Any member of a firm against whom execution might issue, may be proceeded against by judgment summons: see notes to section 112, subsection 4; *Taylor v. Cook*, 11 P.R. 60.

Married Women.—The examination, and especially the committal of a married woman upon a judgment summons, has not usually been favored by the courts either here or in England. But on a judgment against a

married woman, personally, for a debt contracted before marriage, she may be examined as a judgment debtor, and may be committed for failure to attend upon an after judgment summons: *Re Teasdale v. Brady*, 18 P.R. 104. And a married woman, who had fraudulently disposed of her property, and refused, or professed to be unable, to give any information as to where it was, was held liable to committal under C.R. 932, and, after being allowed an opportunity to become aware of her position, an order was made for her committal to gaol for three months and for payment of the costs of the motion: *McKinnon v. Crowe*, 17 P.R. 291.

A creditor's rights against a married woman debtor are determined by the statute at the time the debt is contracted, and cannot be enlarged by the debtor subsequently becoming a widow; and a judgment against the separate estate of a married woman will not authorize her committal, and, it seems, it will not authorize her examination: *Re McLeod v. Enigh*, 12 P.R. 450; *Scott v. Morley*, 20 Q.B.D. 120; see *Bank of Montreal v. Richardson*, 34 C.L.J. 329; nor will it authorize an order for payment in instalments out of income which she is restrained from anticipating, though since the judgment she has received income: *Morgan v. Eyre*, 20 L.R. Ir. 541; but on such a judgment in the High Court or County Courts, a married woman might be examined and might be committed for not attending or not answering questions, the punishment being for contempt and not by way of execution: *Metropolitan Loan & Savings Co. v. Mara*, 8 P.R. 355; *Pearson v. Essery*, 12 P.R. 466; *Watson v. Ont. Supply Co.*, 14 P.R. 96. Under the English County Court Rules, 1892, the married woman may be examined as to what separate estate she has: *Aylesford v. G. W. Ry. Co.*, 8 T.L.R. 786 (1892), 2 Q.B. 626.

Corporations.—The section does not apply to a corporation, nor can the directors or officers be examined under it: *Dickson v. Neath & Brecon Ry. Co.*, L.R. 4 Ex. 87.

The Summons.—A party having an unsatisfied judgment, who desires to proceed under this and the following sections of the Act, must file with the clerk an affidavit (Form No. 33), or to the like effect, and thereupon a summons (Form No. 54), bearing the proper new number in its order, shall be issued; if the proceeding be taken in a Division Court other than that in which the judgment was entered, there shall be delivered to the clerk a transcript of such judgment: Rule 200.

The affidavit required by this section must be made and filed before a garnishee may be examined under section 253: *Re Dowler v. Duffy*, 29 O.R. 40.

A summons under this section, and one for the commencement of the action, cannot be issued together: *Bishop v. Holmes*, 4 U.C.L.J. 235; see section 253.

A judgment summons cannot issue on a judgment more than six years old without leave of a judge, unless some payment has been made thereon within twelve months previously: Rule 141; nor can such summons issue with leave after the issue of *fi. fa.* lands under section 230: see notes to that section.

Debt, Damages or Costs.—The debt or damages, or costs, being more than \$100, does not prevent an examination: *Byrne v. Kuipe*, 5 D. & L. 659.

Judgment Has Been Obtained.—The summons may issue from the court in which judgment has been obtained, if the judgment debtor resides or carries on his business within the county in which that court is situated; but if he resides or carries on his business in another county the summons must issue from the court within the limits of which he resides upon a transcript thereto under section 223. See Rule 200.

It is not necessary that execution should issue before this proceeding can be resorted to: *Peek v. McDougall*, 27 U.C.R. 360.

If such a proceeding should be vexatiously taken, it is probable the judgment creditor would be visited with the costs of it.

Where proceedings in the suit were served upon the wrong man, who disregarded them, and a judgment summons was issued and an order for commitment made, and the party imprisoned, the plaintiff was held liable for false imprisonment: *Walley v. McConnell*, 13 Q.B. 903.

At a Time and Place.—"There is nothing in either the language used or the context to show that the examination is to be made in the judge's chambers at the county town, and it would be a great hardship to bring parties there for the purpose if a discretion existed. But it does not. The party is summoned to be and appear at the place where the court is held, in the division in which it issues; and there is no authority to require him to appear elsewhere, for the order in respect to the matter must be entered by the clerk in like manner as any other order of the court:" 9 U.C.L.J. 101.

Touching His Estate and Effects.—A defendant under judgment summons is bound virtually to give a full exposition of his affairs: *Republic of Costa Rica v. Strousberg*, 16 Ch. D. 8; see section 246.

The debtor must furnish such information about his affairs as will place his dealing in intelligible shape. It is not enough for him to say he does not know, if he has the means at hand to qualify himself to explain: *Foster v. Van Wormer*, 12 P.R. 597.

It is submitted that the examination of the judgment debtor is not restricted to the period of contracting the debt, but that it may be shown at some anterior time, no matter how far back the debtor had property, as to which he may be required to give an account: *Ontario Bank v. Mitchell*, 32 C.P. 73.

Disposal He Has Made of any Property.—See notes to section 247.

Affidavit for Summons.—It is important to consider the condition on which the summons can issue under this section. An affidavit must be made and filed as required by this section. It must be made "by the plaintiff, his solicitor or agent." A stranger could not make it: *Herschfeld v. Clarke*, 11 Ex. 712; *Christopherson v. Lotinga*, 15 C.B.N.S. 809; *Barwick v. De Blaquiére*, 4 P.R. 267; *Tiffany v. Bullen*, 18 C.P. 91; *Frederiel v. Vanderzee*, 2 C.P.D. 70; *Bank of Montreal v. Cameron*, 2 Q.B.D. 536; and the affidavit is also a condition precedent to the issue of a judgment summons against a garnishee under section 225: *Re Dowler v. Duffey*, 29 O.R. 40; see Rule 200.

As the right to examination of a debtor depends on the making, by one of the persons mentioned in this section, of this affidavit and the due filing of it, care should be taken to see that such is done. This is more important in cases where the defendant does not appear, for should an order of commitment be made against him, and enforced without these requirements being first complied with, the judge, clerk and execution creditor would probably be liable as trespassers: see notes to section 249; and prohibition might be granted: *Re McGregor v. Norton*, 13 P.R. 223.

Should the defendant appear and submit to examination, he would thereby waive the making or filing of this affidavit, and an order could be made against him just in the same way as if the affidavit had been properly made and filed: see *R. v. Hughes*, 4 Q.B.D. 614; *Dayfoot v. Byrens*, 7 C.L.T. 21.

It is doubtful if prohibition would go on a defective affidavit: *Re Sato v. Hubbard*, 8 P.R. 445.

See notes to section 247.

For form of affidavit, see Form 33.

Circumstances Under Which He Contracted the Debt, Etc.—It was held that these words could not be construed so as to include an unsuccessful plaintiff: *Meyers v. Kendrick*, 9 P.R. 363; *Troutman v. Fiskin*, 13 P.R. 153; see *Griffiths v. Canonica*, 5 B.C.R. 48, in which it was held that the words "as to the means or property he had when the debt or liability was incurred" refer to the liability to recover which the action was brought and do not apply to a judgment for costs only. It is to be observed, however, that this section expressly confers the right of examination on a judgment for costs.

Service of Judgment Summons.—Formerly the service of a judgment summons could be effected "by leaving a copy thereof at the house of the party to be served or at his usual or last place of abode, or with some grown person there dwelling," but by 57 Vic. c. 23, s. 15, these words were struck out. The effect is to require all such summonses to be served personally. As to personal service see notes to section 103, *ante* p. 159. For affidavit of service see Form No. 28.

If the summons cannot be served a return with the reason *in writing* endorsed thereon must be made by the bailiff: Rule 183.

It was held that in serving defendant with an order to examine him as a judgment debtor, it was not necessary in order to obtain a *ca. sa.*, to exhibit the original order unless demanded: *Imperial Bank v. Dickey*, 8 P.R. 246. See also notes to section 247.

As to time of service, see Rules 17, 18, and 104 and sections 100 and 101 and notes thereto.

Payment of Expenses and Mileage.—When a judgment debtor resides more than three miles from the place of sitting of the court he must be paid or tendered a sum equal to 75c. for his day's attendance and 10c. for each mile from his place of residence to the place of sitting, otherwise his non-attendance will not be considered wilful. Such payment to be costs in the cause: Rule 202.

Judgment Debtors' List.—See Rule 155 and notes [to section 121, *ante* p. 211.

Witnesses Whom the Judge Think Necessary.—When the defendant cannot or will not give a full account of his circumstances, or where his evidence is intended to be contradicted, other witnesses may be called to show the facts. The Judge, however, has a discretion whether he will hear the plaintiff or his witnesses. But the ordinary rules for dealing with litigated matters where money or money's worth only are involved, are not to be applied, without more, to cases where the liberty of the person is at stake: *Graham v. Devlin*, 13 P.R. 245.

244. The examination shall be held in the Judge's chamber, unless the Judge otherwise directs. R.S.O. 1887, c. 51, s. 237.

The examination to be in Judge's chamber.

In the Judge's Chamber.—See notes to section 243 *ante* p. 422. Without this provision the examination would have to be held in open court: *Nagle-Gillman v. Christopher*, 4 Ch. D. 173; *Kerwood v. Eastwood*, 57 L.J.Q.B. 455. "The simple object of the enactment is to prevent needless exposure in open court, and to give authority to hold the examination in private: and the practice in every court we have knowledge of is to allow the general public to depart after the ordinary business is over, and to make the court room the judge's chamber for the time being:" 9 U.C.L.J. 101.

Costs.

245. The costs of the summons and of all proceedings thereon shall be deemed costs in the cause, unless the Judge otherwise directs. R.S.O. 1887, c. 51, s. 238.

Costs in the Cause.—*i.e.*, the costs of the ordinary proceedings in a suit: *Cameron v. Campbell*, 1 P.R. 173.

Unless the Judge Otherwise Directs.—Where the proceedings are taken vexatiously or wantonly, or without any reasonable prospect of eliciting anything favorable to the creditor, it is submitted that the judge would exercise a reasonable discretion in refusing costs.

Party examined and discharged not to be again summoned.

Exception.

246. In case a party has, after his examination, been discharged by the Judge, no further summons shall issue out of the same Division Court at the suit of the same or any other creditor, without an affidavit satisfying the Judge upon facts not before the court upon the examination, that the party had not then made a full disclosure of his estate, effects and debts, or an affidavit satisfying the Judge that since the examination the party has acquired the means of paying. R.S.O. 1887, c. 51, s. 239.

No Further Summons Shall Issue.—That is a summons of the same character.

Rule 201 provides that in order that a party may not be again summoned for examination at the suit of the same or any other creditor, without notice of such examination every clerk shall keep a book in which entries may be made in the form of an order, to be called the "Judgment Debtor's Book" (Form 8) in which shall be entered the date when each judgment debtor was examined and discharged by the judge, together with the number and style of the cause in which he was summoned and examined. This rule is important as it alters the practice, and places a new liability upon the clerk. Formerly it was no part of the clerk's duty to know whether or not a summons was in violation of the section. But under this rule the clerk should, before issuing a judgment summons, examine the judgment debtors' book to see whether the judgment debtor has been examined and discharged, and if his name is found therein the clerk should refuse to issue the summons, otherwise he may render himself liable to an action.

Has Acquired the Means of Paying.—There are two grounds upon which the judge would be warranted in granting an order for another summons.

The section does not apply to a summons from another Division Court, but to the case of any other creditor in the same court.

What might be considered a full "disclosure" is a matter of some doubt. It could hardly be said that a debtor should voluntarily make such disclosure as this section contemplates, but it would appear that if he made such full disclosure concerning matters upon which the plaintiff thought proper to examine him it would be a compliance with the section. If the plaintiff should adopt the latter alternative of the section, the affidavit should clearly show what means, if any, the defendant has acquired of paying the debt since the examination. For form of affidavit, see Form 34.

247. If the party so summoned—

1. Does not attend as required by the summons, or allege a sufficient reason for not attending; or

When judgment debtor may be committed to gaol.

2. [If he attends and refuses to be sworn or to make answer to such questions as may be put to him and which, in the opinion of the judge, are proper questions;] or

3. [Repealed by 61 V. c. 15, s. 4.]

4. If it appears to the Judge, either by the examination of the party or by other evidence, that the party,

(a) Obtained credit from the plaintiff or incurred the debt or liability under false pretences, or by means of fraud or breach of trust; or

(b) Has made or caused to be made any gift, delivery or transfer of any property, or has removed or concealed the same with intent to defraud his creditors or any of them; or

5. [If it appears that the judgment debtor had, when or since judgment was obtained against him, sufficient means and ability to pay the debt or damages, or costs recovered against him, either altogether or by instalments which the Court in which the judgment was obtained has ordered without depriving himself or his family of the means of living, and that he has wilfully refused or neglected to pay the same as ordered,

the Judge may, if he thinks fit, order such party to be committed to the common gaol of the county in which the party so summoned, resides or carries on business, for any period not exceeding forty days.] 61 V. c. 15, s. 4.

[6. Sub-sections (2) and (5) of this section shall not apply to claims, suits or proceedings upon debts contracted before the passing of this Act.] 61 V. c. 15, s. 9.

Does Not Attend.—The judge should see that the defendant has been properly called upon to appear on the summons before proceeding. The affidavit of service should conform to the provisions of Rules 262 *et seq.*, and show that the judgment summons has been personally served at least ten days before the day on which the party is required to appear: Rules 16, 17, 192.

A married woman may be committed for non-attendance upon a summons issued on a judgment against her personally for a debt contracted before marriage: *Re Teasdale v. Brady*, 18 P.R. 104. See notes to section 243.

Sufficient Reason.—Non-payment of his fees and travelling expenses as required by Rule 201 would be a "sufficient reason" if the debtor lives

more than three miles from the place of sitting of the court. But otherwise inability to pay expenses would not, it is submitted, be a good reason for not attending: Contrast C.R. 930.

Illness, it is submitted, would be: *Re Jacobs*, 1 Har. & W. 123; *Boast v. Firth*, L.R. 4 C.P. 1; *Robinson v. Davison*, L.R. 6 Ex. 269; *R. v. Wellings*, 3 Q.B.D. 426. See section 241.

Proper Questions.—What are proper questions is a matter for the judge, in the exercise of the discretion given him under this sub-section, to decide. A great deal may depend upon the conduct of the party under examination, and the circumstances of each particular case. The examination should not be conducted so as to try to entrap the debtor, but it should be full, fair and searching: *Graham v. Devlin*, 13 P.R. 245. "In the opinion of the judge" means according to the judgment of the judge: *Omerod v. Todmorden Co.*, 8 Q.B.D. 664; which judgment should be exercised honestly and in the spirit of the Act, not arbitrarily: see notes to *ante* pp. 194, 315, 332.

It is submitted that notwithstanding the repeal of sub-section 2 of the Revised Statutes, 1897, the answers to the questions should be such as would satisfy the mind of a reasonable person that a full and true disclosure has been made; see *Graham v. Devlin*, 13 P.R. 245. Otherwise the object of the examination would be defeated. If the questions are pertinent to purposes of the examination as provided in section 243, and the replies of the party under examination so equivocated as to render his answers abortive it would be the same as if he had refused to answer: see *Republic of Costa Rica v. Strousberg*, 16 Ch. D. 8. An answer in which the person declares his ignorance or obliviousness of a transaction of which it is manifest he cannot be ignorant or oblivious is not a "satisfactory" answer: *Ex parte Bradbury*, 14 C.B. 15. And a married woman who had disposed of certain property who refused or professed to be unable to give any information as to where it was, was committed to gaol for three months under C.R. 907, after being allowed an opportunity to become aware of her position: *McKinnon v. Crowe*, 17 P.R. 291. Where a debtor did not, in his examination give a full explanation for want of knowledge, he was ordered to qualify himself by obtaining full knowledge of all his transactions: *Foster v. Van Wormer*, 12 P.R. 597; see also, *Lemon v. Lemon*, 6 P.R. 184; *Schneider v. Agnew*, 6 P.R. 338; *Hobbs v. Scott*, 23 U.C.R. 619. See notes to section 243.

Fraud or Breach of Trust.—Credit must have been obtained, or the debt incurred by false pretences, and strict legal proof of it must be given: see 3 U.C.L.J. 196; *Jenkins v. Fereday*, L.R. 7 C.P. 358; *Cooper v. Pritchard*, 11 Q.B.D. 351.

"In ordinary parlance, we speak of obtaining money or property by false pretences as indicating the criminal offence of obtaining the same by false pretences with intent to defraud:" *per Harrison, C.J.*, *Crawford v. Beattie*, 39 U.C.R. at p. 29.

The debtor must, at the time of obtaining credit, have knowingly made a false statement of past or present fact, and the creditor must have been induced to give credit by relying on such statement: Criminal Code, 1892, section 358.

A "breach of trust" would be the non-payment of money which the defendant had received for the plaintiff upon any express or implied trust. An auctioneer would fall within this category: *Crowther v. Elgood*, 34 Ch. D. 691; Criminal Code, 1892, section 363.

As to fraudulent acts justifying commitment: see 4 U.C.L.J. 12, 61; 9 U.C.L.J. 121; *Winks v. Holden*, 1 C.L.J. 100.

Gift, Delivery, or Transfer of Any Property.—The property may be either real or personal: *Kidd v. O'Connor*, 43 U.C.R. 193. A conveyance of real estate is a "gift, delivery or transfer of property" within the meaning of this sub-section; and an express wrongful intent need not be shown. It is sufficient to show that the natural consequence of what was done was to defraud creditors: *per Robb, Co. J.*; *Kitchen v. Saville*, 17 C.L.T. 88. It was also held in that case that this sub-section is *intra vires* of the Ontario Legislature: *Ib.*

This paragraph of the sub-section also describes a criminal offence: *R. v. Henry*, 21 O.R. 113; Criminal Code, 1892, section 368.

A transfer which merely amounted to a preference, would not be within this provision: *May on Fraudulent Conveyances*, 100. And a conveyance of property by the debtor to his wife, to whom he was indebted, under pressure for payment or security, is not within this provision, and the judge rescinded an order for committal made by himself on evidence of the indebtedness, and of pressure having been made: *Kitchen v. Saville*, 17 C.L.T. 88.

An order having been made for committal on the ground that the defendant had made away with his property, the fact that the judge refused to allow him to make explanations as to his dealings with money lent and repaid to him after judgment was not a ground for granting prohibition: *Re Reid v. Graham Bros.*, 25 O.R. 573; affirmed on appeal, 26 O.R. 126.

Sufficient Means and Ability to Pay.—This must mean with reference to the necessities of the debtor and his family. Equitable estate can be looked at for the purpose of determining if the debtor has had sufficient means: *Bennett v. Powell*, 1 Jur. N.S. 719.

The judge may take into account money derived from a gift. It is not necessary that the "means and ability to pay" should have been derived from his earnings or a fixed income: *Ex parte Koster, Re Parke*, 14 Q.B.D. 597.

When the debtor has means to pay a part only of the sum due, the court is not precluded from making the order: *Ex parte Fryer*, 17 Q.B.D. 718.

There is no law which compels a debtor to work for his creditors if he chooses to live in idleness, or which prevents him from giving away his time and services, or devoting them towards satisfying one creditor's demand: *Baby v. Ross*, 14 P.R. at p. 446.

Where the Division Court judge has been judicially satisfied with the ability of a debtor to pay, his conclusion cannot be interfered with: *Re Hyde v. Cavan*, 31 O.R. 189; see *Esdaille v. Visser*, 13 Ch. D. 421.

Where the debtor lived in good style as a country gentleman, but his horses, carriages, etc., all belonged to his wife, an order for his committal was, nevertheless, affirmed: *Harper v. Serimegeour*, 5 C.P.D. 366. But this was a decision upon a mere question of fact, and is not binding on any court; and the onus is upon the creditors to prove sufficient means: *Chard v. Jarvis*, 9 Q.B.D. 178. See also 18 C.L.J. 390; *Re Ross*, 29 Gr. 385; *Dillon v. Cunningham*, L.R. 8 Ex. 23; *Esdaille v. Visser*, 13 Ch. D. 421; *Newell v. Van Praagh*, L.R. 9 C.P. 96; *Debenham v. Wardroper*, 48 L.T. 235. A government official who has no other means than his salary may be committed: *Re Hyde v. Cavan*, 31 O.R. 189.

Altogether or By Instalments.—Power is given by sections 151, *ante* p. 284, and 252 *infra*, to order the payment of a judgment by instalments: See also Rule 128.

The judge must adjudicate, in case no order has been made for payment in instalments, that the debtor has had sufficient means and ability to pay the judgment.

An order cannot be made that the debtor pay the debt by a certain time or in instalments, or in default be committed: *Chichester v. Gordon*, 25 U.C.R. 527; *Re Woltz v. Blakely*, 11 P.R. 430; *R. v. Judge of Brompton County Court*, 18 Q.B.D. 213.

But if the judge adjudicates that the defendant has had means, he may order his committal, but may suspend the issue of the order and direct that it shall not issue if the defendant pay the debt or instalments: *Stonor v. Fowle*, 13 App. Cas. 20.

Section 255, conferring the right to examine a garnishee upon a judgment summons has not extended the powers of the judge in that behalf, and such garnishee cannot be committed for default in making payments pursuant to this section: *Re Dowler v. Duffy*, 29 O.R. 40.

The Judge May if He Thinks Fit.—See note to section 8, *ante* p. 5; note to section 174, *ante* p. 315.

Order Such Party to be Committed.—If the judge orders a party to pay the money at a future day, or in default to be committed, and the party again makes default, he cannot be committed without an opportunity of being heard as to the cause of such default: *Abley v. Dale*, 10 C.B. 62; see *ex parte Kinning*, 4 C.B. 507; *Kinning v. Buchanan*, 8 C.B. 271; *Baird v. Story*, 23 U.C.R. 624.

Judgment for debt and costs was given against B., and an order made to pay by instalments. B. made default, and a judgment summons was issued, upon which he was examined and committed for seven days, upon the ground that he had the means of satisfying the judgment and refused to do so. He was subsequently summoned and committed two several times for forty days, each on the same ground. Held, that there was power to commit for default of the same kind as often as default is committed: *Re Boyce*, 2 E. & B. 521. A warrant of commitment, stating that "it appeared to the satisfaction of the judge that the defendant had obtained credit from the plaintiff under false pretences, and had made a gift, delivery or transfer of his property, with intent to defraud his creditors, and thereupon the judge by a certain order did adjudge, etc.," not being in the nature of a conviction, is not bad for stating in the alternative the mode by which the offence was committed: *Ex parte Purdy*, 9 C.B. 201. Where a defendant does not attend on judgment summons, and a warrant of commitment is issued in consequence, payment made to the plaintiff will prevent the execution of the warrant: *Ex parte Dakins*, 16 C. B. 77; *Re McLeod v. Emigh*, 12 P.R. 450. An order on which a warrant of commitment was founded, that defendant pay the debt at a future given day or be imprisoned for thirty days, was held bad: *Dews v. Riley*, 11 C.B. 434; 4 L.C.G. 65. It follows from *Abley v. Dale*, 10 C.B. 62, and the case just quoted of *Dews v. Riley*, that if the judge postpones the ordering of commitment of the defendant after examination, he must have an opportunity of being again heard: see also *Bullen v. Moodie*, 13 C.P. 126; 2 E. & A. 379, section c.; *Re Hicks*, 5 P.R. 88. But if in the presence of the defendant, the judge orders his commitment, then there is no necessity for any other summons; *Baird v. Story*, 23 U.C.R. 624. One who does not reside or carry on business in this province could not be committed: *Regan v. McGreevy*, 5 P.R. 94: see notes to sections 87, 104 and 105. An order of commitment upon non-payment cannot be embodied in the original order to pay: *Ex parte Kinning*, 4 C.B. 507. See Rule 203; *Thorpe v. Browne*, L.R. 2 H.L. 220; *R. v. Oxford*, L.R. 7 Q.B. 471.

Where an order was made to commit the defendant to prison in default of payment of an amount due on a judgment, but he was never arrested nor imprisoned under the order which, under the English County Court Rules, expired a year from its date: Held, upon motion for prohibition that as no arrest nor imprisonment had ever taken place upon this order before

its expiration, and as the defendant was still in default, the County Court judge had power to make a second order of commitment: *R. v. Stonor*, 59 L.T. 669; 57 L.J.Q.B. 510. As to life of warrant under this Act: see Rules 203 and 204; notes to section 249.

Where a plaintiff had compounded with a debtor, it was held that the default in payment of the composition was to remit the plaintiff to the position he occupied before the proceedings in respect of the composition, and that consequently where an order had been made for payment by the defendant, proceedings could be taken on such order for non-compliance with it on such default: *Newell v. Van Praagh*, L.R. 9 C.P. 96.

As to what is meant by the term "visible means:" see *Lee v. Parker*, 13 Q.B.D. 835.

By the express terms of this section, the case of *Evans v. Wills*, 1 C.P.D. 229, would not apply, and the debtor could be examined more than once.

The jurisdiction of the superior courts in reviewing committals by an inferior court, is limited to the consideration whether there were materials upon which the judge ordering the committal could have reasonably inferred contempt, and whether the form of committal is in accordance with the forms laid down in the section: *R. v. Jordan*, W.N. (1888) 152; 36 W.R. 589, 796: see *Re Reed v. Graham Bros.*, 29 O.R. 40.

An order for committal should state in which particular the person committed was guilty of default: *R. v. Lambeth*, C.C. Judge, 36 W.R. 475, but this applies only to the formal order, and not to a mere minute made on the pronouncement of his decision: *Harris v. Slater*, 21 Q.B.D. 359.

For form of warrant of commitment in default of appearance and after examination see Forms 162 and 162(a): and for Form of warrant for disobedience of order or for neglect or refusal referred to in this section, see Form No. 334 additional Forms.

Debts Contracted Before 17th January, 1898.—The original clauses of the section as embodied in the Revised Statutes 1897, are still applicable to debts contracted before the passing of the Act, 61 Vic. c. 15. A debtor summoned under this section on a judgment for a debt contracted prior to the 17th January, 1898, may, therefore, be committed, upon any of the grounds enumerated in sub-sections 1 and 4, but also for the reasons set forth in sub-sections 2, 3 and 5 of the original section, which are as follows:

2. If he attends and refuses to be sworn or to declare any of the things aforesaid; or

3. If he does not make answer touching the same to the satisfaction of the judge; or

5. If it appears to the satisfaction of the judge that the party had when summoned, or since the judgment was obtained against him, had sufficient means and ability to pay the debt or damages, or costs recovered against him, either altogether or by the instalments which the court in which the judgment was obtained has ordered, and if he has refused or neglected to pay the same at the time ordered, whether before or after the return of the summons, the judge may, if he thinks fit, order such party to be committed to the common gaol of the county in which the person is summoned resides or carries on his business, for any period not exceeding forty days.

Judgment
summons
where
principal
and interest
sued for
separately.

[247 (a.) Where a judgment has been recovered in an action in the Division Court, which but for the enactment of the 5th section of Chapter 14 of 60th Victoria, now sub-section 2 of section 79 of The Division Courts Act, could not have been recovered in the Division Court, the Court or Judge shall not commit the debtor to gaol upon or in connection with a judgment summons, when a judgment debtor could or would not have been committed to gaol upon or in respect of a judgment recovered in a higher court, or upon or by reason of an examination upon a judgment summons issued upon such last mentioned judgment.] 61 V. c. 15, s. 2.

Sub-section 2 of Section 79.—The provisions of the sub-section referred to permit actions to be brought separately for the principal and for the interest payable to the same person, upon a mortgage, bill, note, bond or other instrument.

Object of the Section.—The evident object of the present section is to prevent the peculiar powers of committal for non-payment of judgment debts, conferred upon the Division Courts, from being exercised in the case of a judgment which, but for sub-section 2 of section 79, must have been recovered in the High Court or in the County Court. To entitle a judgment debtor to the benefit of the enactment, it will be necessary for him to show that the plaintiff, at the time the suit was commenced, had a cause of action for principal and interest, i.e., that both were overdue; that such cause of action was for an amount beyond the jurisdiction of the Division Court; that the plaintiff did not abandon the excess, but sued for either the principal or the interest alone, thus splitting his demand, and thereby was entitled to obtain a Division Court judgment, while still retaining a right to sue for the other part of the cause of action.

Committal in High Court.—C.R. 907 is as follows:—

907. Where the judgment debtor does not attend, does not allege a sufficient excuse for not attending, or if attending, refuses to disclose his property or his transactions, or does not make satisfactory answers respecting the same, or if it appears from such examination that such debtor has concealed or made away with his property in order to defraud or defraud his creditors or any of them, the Court or Judge may order the debtor to be committed to the common gaol of the County in which he resides, for any term not exceeding twelve months; or that a writ of *capias ad satisfaciendum* may be issued against the debtor, or in case the debtor is at large upon bail, may make an order for his committal to close custody; and the Sheriff, on due notice of the order, shall forthwith take the debtor and commit him to close custody until he obtains an order of the Court or a Judge allowing him to go out of close custody, on giving the necessary bond in that behalf, or until he is otherwise discharged in due course of law.

Causes for Committal.—It will be observed that in the High Court there is no power of committal merely because the party has had sufficient means and ability to pay the debt either altogether or by instalments, or because the debt was contracted by fraud or breach of trust. Reckless expenditure of money disclosed by an examination has been said to make an answer unsatisfactory within the Consolidated Rule: *Crooks v. Stroud*, 10 P.R. 131; but the tendency of the other cases is that, so long

as the answers are full and truthful, the fact that they do not account for the application of the debtor's assets in a proper manner will not make them unsatisfactory: *Hobbs v. Scott*, 23 U.C.R. 619; *Lemon v. Lemon*, 6 P.R. 184; *Foster v. VanWormer*, 12 P.R. 597; *Graham v. Devlin*, 13 P.R. 245; and the fact that the debtor has a small sum of money which is required for the support of his children, and which on that account he refuses to hand over to the judgment creditor will not justify committal: *McKay v. Atherton*, 12 P.R. 464. If the property of the debtor has been disposed of, and the proceeds sent to a foreign country, and the debtor professes ignorance of where such proceeds are, committal will be ordered: *McKinnon v. Crowe*, 17 P.R. 291. The court should not be called upon to enquire into the gambling transactions of a debtor to ascertain if he has made or lost money thereby: *Harvey v. Aitkins*, 17 P.R. 71.

248. A party failing to attend according to the requirements of such summons, shall not be liable to be committed to gaol for the default, unless the Judge is satisfied that such non-attendance is wilful, or that the party has failed to attend after being so summoned; and if at the hearing it appears to the Judge, upon the examination of the party or otherwise, that he ought not to have been so summoned, or if at the hearing the judgment creditor does not appear, the Judge shall award the party summoned a sum of money by way of compensation for his trouble and attendance, to be recovered against the judgment creditor in the same manner as any other judgment of the Court. R.S.O. 1887, c. 51, s. 241.

In what cases only the party summoned may be committed for non-attendance; costs allowed him in certain cases.

Such Non-Attendance is Wilful.—It is often a difficult matter to determine when a defendant's failure to attend is wilful non-attendance. It is also difficult to say whether a judge should receive evidence affirmatively showing that fact, or whether the non-attendance is *prima facie* evidence of its being "wilful." It has been said that "wilful, is a word of familiar use in every branch of the law, and although in some branches of law it may have a special meaning, it generally, as used in courts of law, implies nothing blameable, but merely that the person of whose action or default the expression is used is a free agent, and that what has been done arises from the spontaneous action of his will. It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent:" *per* Bowen, L.J., *Re Young and Harston*, 31 Ch.D. 174; *Wilson v. Manes*, 26 A.R. 398; see also *Squire v. Wheeler*, 16 L.T. 93; *Carpenter v. Mason*, 12 A. & E. 629. But it has been said, also, that the word "wilfully" is sometimes used as denoting evil intention: in fact, that such is the common use of the word in the English language, and that a surveyor was not guilty of the offence of "wilfully receiving" a higher fee than he was entitled to when acting under an honest mistake: *R. v. Badger*, 6 E. & B. 137; *Smith v. Barnham*, 1 Ex. D. 419; *Miles v. Roe*, 10 P.R. 218; see notes to section 243 and 247.

After Being So Summoned.—Formerly the section required the judgment debtor to be *twice* summoned; but a second judgment summons is now unnecessary. Personal service is now necessary in all cases: see section 243.

Compensation for His Trouble and Attendance.—If a creditor, knowing that his debtor has been unfortunate, or if when the summons was

issued he knew that the debtor had no means beyond what afforded himself and family a scanty subsistence, or under other circumstances of a like character, nevertheless has the debtor summoned under section 243, and the judge makes no order, it is submitted that a wise discretion would be exercised in making the creditor pay the debtor for his trouble and attendance under this section, and also bear the costs of the proceedings under section 245; see *Millar v. Macdonald*, 14 P.R. 499; and see Rule 201 cited *ante* p. 424.

The words "shall award" appear to leave the judge no discretion if application is made, but are imperative. The judge could probably award the debtor "a sum of money by way of compensation" if there should be a violation of section 246. This is mentioned as an instance. There may be others, no doubt.

**Warrant of
Commit-
ment.**

249. Where an order of commitment as aforesaid has been made, the Clerk of the Court shall issue, under the seal of the Court, a warrant of commitment directed to the Bailiff of any Division Court within the county, and the Bailiff may by virtue of the warrant take the person against whom the order has been made. R.S.O. 1887, c. 51, s. 242.

Order of Commitment.—The judge's endorsement on the judgment summons was held to be the order upon such summons, and a subsequent order was held to be illegal: *Re McLeod v. Emigh*, 12 P.R. 450; *R. v. Judge of Brompton C.C.*, 18 Q.B.D. 213, but this case was reversed on appeal *sub nom* *Stonor v. Fowle*, 13 App. Cas. 20, upon it appearing that the formal order was correct in form; and in a subsequent case, it was held that a minute taken by the clerk would not be the order, and that the order might be drawn up subsequently to its pronouncement: *Harris v. Slater*, 21 Q.B.D. 359. The judge has power to vacate the order upon a subsequent application: *Kitchen v. Saville*, 17 C.L.T. 88.

Warrant of Commitment.—The warrant of commitment shall bear date on the day on which the order for commitment is made, and shall have endorsed thereon the amount of the debt and costs in such proceedings, or of fine and costs up to the time of its delivery to the bailiff for execution, and shall continue in force for six calendar months from such date and no longer, unless renewed by an *ex parte* order of the judge, upon affidavit, showing the cause of the non-execution and that the moneys thereunder have not been satisfied: Rule 203. See note *infra* "Renewal of Warrant." In issuing the warrant the clerk should be careful to see that six calendar months from the date of the order of commitment have not expired: *Hayes v. Keene*, 12 C.B. 233. If they have he would, in the event of the debtor's arrest, be liable as a trespasser: *Lawrenson v. Hill*, 10 Ir. C.L.R. 177; *Pedley v. Davis*, 10 C.B.N.S. 492; but see *Ex parte O'Neill*, 10 C.B. 57.

The warrant must, in addition to being under seal, be dated, otherwise the arrest would be illegal: *Re Fletcher*, 1 D. & L. 726; see Forms 162 and 162a.

On motion to discharge a prisoner from gaol, it was held that the Habeas Corpus Act of Ontario, R.S.O. c. 83, s. 1, enables a person confined under civil process to obtain the writ; and that a warrant of commitment which did not show that it appeared to the satisfaction of the judge that the debtor had sufficient means to pay the debt or damages by instalments, which the court had ordered, was defective, and that the debtor could not be imprisoned for non-payment or disobedience of the order to pay: *Re Gesner*, per *Osler, J.*, (not reported); see also *R. v. Lambeth C.C. Judge*, 36 W.R. 475; but in *Re Anderson v.*

Vanstone, 16 P. R. 243, the Divisional Court held that an order for committal of a judgment debtor for default of attendance was "process" in an action within the exception to section 1 of R.S.O. c. 83, and a writ of *habeas corpus* was quashed as having been improvidently issued.

The Bailiff of any D. C. Within the County.—A warrant of commitment must be directed to a bailiff within the county in which the proceedings are taken, and is not effectual beyond the limits of the county within which it is issued, nor does the "backing" of it by a magistrate in another county give it any force or validity there: *Re Hendry*, 27 O. R. 297.

It need not be executed by the bailiff of the court from which it issues. The bailiff of any court within the county has equal power to do so. But the warrant should be directed to the bailiff who is to execute it.

Take the Person.—"On receiving a warrant, the officer should see that it has the seal of the court and the signature of the clerk: and further, if a commitment for contempt, that it also has the seal and signature of the judge to it. The arrest may be made at any time of the day or night, but must not be made on a Sunday:" 4 U.C.L.J. 62: 29 Car. II. c. 7, s. 6. If the debtor is ordered to be committed any time after examination, and the bailiff is negligent in executing the warrant, he and his sureties would no doubt be liable: see 4 U.C.L.J. 62.

"The bailiff will not be justified in breaking open the outer door of a person's dwelling house to execute a warrant, nor indeed in the use of any force to effect an entrance, even to the breaking of a latch:" 5 Coke, 92.

An arrest under such circumstances would be void, and render the bailiff liable to an action: see *Hodgson v. Tawning*, 5 Dowl. P.C. 410; but, having once got in, he may break any inner door; so he may break open the outer door of a barn, stable or outhouse. But what has been said before as to executions against goods will apply in this particular to the execution of warrants: and the caution is repeated, that even when force is necessary, a demand for admission should be first made, and all fair means resorted to before force is employed. Although an officer having reason to believe that a party is in his house, may peaceably enter to arrest him, yet he cannot justify even a peaceable entry into the house of a stranger, except by proof that the party was actually there: *Cook v. Birt*, 5 Taunt. 765; *Johnson v. Leigh*, 6 Taunt. 246. If after being once arrested, the party escape and shelter himself in the house of another, the bailiff may enter and take him, provided *it be done on fresh pursuit*: Coke, 92. The bailiff should always keep this in his mind, that if a defendant escape from custody through his negligence or want of precaution, he will be liable to plaintiff: it may be, to the whole extent of the claim: 4 U.C.L.J. 62, 63. "To constitute an arrest, the party should, if possible, be touched by the officer: bare words will not make an arrest without laying hold of the person or otherwise confining him. But if a bailiff come into a room and tell a party he arrests him and locks the door, this is an arrest, for he is in the custody of the bailiff: or if in any other way the party submit himself by word or action to be in custody, it is an arrest. The bailiff, whether known as such or not, ought to produce his warrant if required: but should in no case part with the possession of it. If the party snatch or take the warrant, the bailiff may force it from him, using no unnecessary violence in so doing. As in case of a constable where resistance is made, the utmost caution and forbearance should be used: but the bailiff may lawfully use force to overcome resistance—that force not exceeding the necessity of the case, and ceasing the instant resistance ceases. Whenever difficulty is apprehended in effecting an arrest, the bailiff may call any constable or peace officer to his assistance, as constables and peace officers within their respective jurisdictions will

be bound to aid the bailiff to make an arrest. It would seem that where the bailiff uses proper precaution, and acts with reasonable firmness, he is not liable in case of a rescue being made. When an arrest is made, the party arrested should be at once brought to gaol, unless indeed he pay the amount mentioned in the warrant, with the costs, which he may do at any time before actual delivery to the gaoler: Rule 206. See notes to section 251. No more force or restraint should be imposed on the prisoner than is necessary to prevent his escape, and no delay should be made in placing the party in gaol. The warrant is left with the gaoler. The bailiff should obtain a memorandum from the gaoler of his having received the warrant and the party named therein from the hands of the bailiff. As in other cases, the bailiff must make return to the clerk of what he has done under the warrant: 4 U.C.L.J. 83; see also notes to section 247. As to the indorsement on the warrant by the bailiff after arrest, see Rule 187. *Quære*: Should a judge, if in doubt as to the validity of a commitment on application to discharge the debtor presume in favor of liberty and discharge him? See *Re Bebe*, 3 P.R. 270; *R. v. Jordon*, 36 W.R. 589.

In *Sandon v. Jervis*, E.B. & E. 935, it was held that a sheriff's officer, under execution of a *ca. sa.*, by putting his hand into a debtor's dwelling-house by an opening in a window caused by a pane having been broken in the scuffle, but not by the officer, touched the debtor who was inside the house, and then said, "You are my prisoner,"—was an arrest.

But if an officer opens a window (which is shut but not fastened) of a house for the purpose of making an arrest, it would seem that the arrest is unlawful: *Nash v. Lucas*, L.R. 2 Q.B. 590; *Angleheart v. Rathier*, 27 C.P. 97.

A bailiff could be held responsible for not arresting: *Burham v. Hall*, 15 C.L.J. 204.

If it had not been for D.C. Rules 203 and 204, there would not be a limit to the time within which a warrant of commitment could be executed: *Hermitage v. Kilpin*, L.R. 9 Ex. 205.

See sections 222 and 251.

Renewal of Warrant.—Upon an *ex parte* application founded upon affidavit showing to the satisfaction of the judge the cause of the non-execution of the warrant and that the moneys payable thereunder have not been satisfied, the judge may, during the continuance of the warrant, order the same to be renewed for not more than six months or for a less period: Rules 203, 204. The renewal shall be made by the clerk by marking in the margin or endorsing thereon—"Renewed by judge's order for _____ calendar months from the _____ day of _____ A.D., 19____, X.Y., clerk:" Rules 204, 205.

The application for renewal must be made while the first warrant is in force: see Rule 25, cited *ante* p. 162, and notes.

Only one renewal is provided for and it would seem that the life of an order of commitment cannot exceed twelve months.

The order for renewal should be filed with the clerk who will then make the necessary endorsement. The clerk should enter the order and renewal in the procedure book.

Warrant to be Delivered to Gaoler.—At the time of delivering the party arrested to the gaoler, the bailiff must deliver to him the warrant of commitment and endorse thereon the amount of his fees and mileage and a statement of the actual day of arrest: Rule 187. The fees and mileage will be added to the amount of the debt, and costs required to be endorsed thereon under Rule 203 in order that the debtor may ascertain the full amount required to obtain his discharge under section 251.

It may be presumed that the rule requiring the bailiff to endorse on the warrant the actual date of arrest contemplates the period of imprisonment commencing from the moment of the arrest by the bailiff, and that the gaoler is to compute the time from the date of such endorsement; but see notes to section 250. If, however, the gaoler does not detain the prisoner longer than the period mentioned in the warrant, although he may have been in custody prior to the day of his delivery to the gaoler, the latter is not liable: *Henderson v. Preston*, 21 Q.B.D. 362.

250. All Constables and other Peace Officers within their respective jurisdictions shall aid in the execution of every such warrant, and the Gaoler or Keeper of the gaol of the County in which the warrant has been issued, shall receive and keep the defendant therein until discharged under the provisions of this Act or otherwise by due course of law. R.S.O. 1887, c. 51, s. 243.

Constables
etc., to ex-
ecute war-
rants.

All Constables, Etc., Shall Aid in the Execution.—A refusal to "aid in the execution" of a warrant of commitment would be a misdemeanor: *R. v. Sherlock*, L.R. 1 C.C. 20; Criminal Code 1892, 142. See notes to section 55 and also notes to section 249.

By Due Course of Law.—If the gaoler should keep the debtor in prison longer than the law allows, according to the facts appearing on the face of the warrant, he would be liable: *Moore v. Rose*, L.R. 4 Q.B. 486; and if the debtor should escape, the gaoler would also be liable: *Alsept v. Eyles*, 2 H. Bl. 108, even though he escape through a relaxation of the prison rules on account of the debtor's ill health: *Haines v. East India Co.*, 11 Moo. P.C. 39; or the insufficiency of the gaol: *Rowan v. McDonnell*, H.T. 3 Vic.; *R. & J.* 1624.

As to damages in a case against any officer or gaoler for an escape, see *Macrae v. Clarke*, L.R. 1 C.P. 403; *ante* p. (26).

The imprisonment commences to run from the day on which the prisoner is actually lodged in gaol: *Ex parte Foulkes*, 15 M. & W. 612; but see notes to section 249. A gaoler acting in obedience to a warrant valid on its face, is protected if he does not detain the prisoner longer than the period mentioned therein, although he may have been in custody prior to the day of his delivery to the gaoler: *Henderson v. Preston*, 21 Q.B.D. 362.

251. Any person imprisoned under this Act, who has satisfied the debt or demand, or any instalment thereof payable, and the costs remaining due at the time of the order of imprisonment being made, together with the costs of obtaining the order, and all subsequent costs, shall, upon the certificate of such satisfaction, signed by the Clerk of the Court, or by leave of the Judge of the Court in which the order of imprisonment was made, be discharged out of custody. R.S.O. 1887, c. 51, s. 244.

When
debtor in
custody
shall be dis-
charged.

Payment on Arrest.—If the debtor on being arrested and before he is delivered to the gaoler, pay the bailiff the amount endorsed on the warrant or if the judgment creditor so requests the bailiff *in writing* the bailiff must discharge the prisoner and pay over the money received to the clerk within twenty-four hours: Rule 206. No provision is made for

payment of the bailiff's fees in such a case, and the bailiff is not required to endorse his fees on the warrant until he delivers the debtor to the gaoler. If the debtor pays the debt and costs to the execution creditor, but makes no application to the court, and he is subsequently arrested by the bailiff, the arrest is legal: *Davis v. Fletcher*, 2 E. & B. 271.

Payment While in Custody.—After the debtor is delivered to the gaoler the bailiff could not receive payment of the debt and costs, nor would the gaoler have power to receive the money and allow the debtor to go at large: *Arnott v. Bradley*.

The proper course to pursue would be to pay the amount to the clerk of the court from which the warrant issued, get a certificate from him of such satisfaction, upon which or by order of the judge the defendant would be entitled to his discharge.

The gaoler would be bound to liberate the defendant on the certificate of the clerk or on an order of the judge, either of which the gaoler should retain as his security. In the case of a discharge by the order of the judge on the payment of the default, as remarked by Jervis, C.J., in the case of *Ex parte Dakins*, 16 C.B. at p. 93, "When the money is paid, the judge becomes a mere ministerial officer to order the discharge. He has no discretion. The prisoner is entitled to the order as a matter of course."

Judge
may re-
scind order
and may
alter and
modify the
same.

252. The Judge before whom the summons is heard may, if he thinks fit, rescind or alter any order for payment previously made against a defendant so summoned before him, and may make any further or other order, either for the payment of the whole of the debt or damages recovered and costs forthwith, or by instalments, or in any other manner that he thinks reasonable and just. R.S.O. 1887, c. 51, s. 245.

May Rescind or Alter any Order.—This section is substantially taken from the English Statute 9 & 10 V. c. 95, s. 100; see also 12 & 13 V. (Imp.) c. 101, s. 1. Power is here given to the judge, on the hearing of a judgment summons, if he thinks fit, to mould the judgment of the court to suit the debtor's means and circumstances.

The words "previously made" used in this section, it is submitted, have reference to any order that may have been made under the 151st section, or on any previous judgment summons.

See *Kitchen v. Saville*, 17 C.L.T. 88, in which it was held by Robb, Co.J. that a judge has power to vacate an order of commitment made by him.

When de-
fendant
may be ex-
amined
at hearing
as to his
means, etc.

253. In case the defendant in an action brought in a Division Court has been personally served with the summons to appear, or personally appears at the trial, and judgment is given against him, the Judge, at the hearing of the cause or at an adjournment thereof, may examine the defendant and the plaintiff and any other person touching the several things hereinbefore mentioned, and may commit the defendant to prison, and make an order in like manner as he might have done in case the plaintiff had obtained a summons for that purpose after judgment. R.S.O. 1887, c. 51, s. 246.

Judge May Examine Defendant, Etc.—This is seldom resorted to. It can only be done where the defendant has been "personally served" with the summons or "personally appears." It would probably be acted upon in case the defendant had the means of to pay the debt and was about to leave the country so as to avoid such payment before a judgment summons could be heard. The judge's authority under this section is the same as that given him under section 243. See notes to that section.

254. No imprisonment under this Act shall extinguish the debt or other cause of action on which a judgment has been obtained, or protect the defendant from being summoned anew and imprisoned for any new fraud or other default rendering him liable to be imprisoned under this Act, or deprive the plaintiff of any right to take out execution against the defendant. R.S.O. 1887, c. 51, s. 247.

Debt not to be extinguished by imprisonment.

Any New Fraud or Other Default.—At common law imprisonment on final process was generally considered a satisfaction of the plaintiff's debt. But it is not so under the provisions of this section: see *Evans v. Wills*, 1 C.P.D. 229.

The judge can commit for as many defaults in payment as the facts warrant. There should be a fresh adjudication every time: *Re Boyce*, 2 E. & B. 521; see notes to section 247.

255. In cases in which judgment shall be recovered against a garnishee under sections 190 or 193 of this Act, such garnishee shall be liable to be examined as a judgment debtor under sections 243 to 254 inclusive of this Act. 57 V. c. 23, s. 18.

Similar examination of garnishee.

Examined as a Judgment Debtor.—Prior to the introduction of this section by 57 Vic. c. 23 s. 18, it was held that a garnishee could not be examined as a judgment debtor: *Hanna v. Coulson*, 23 O.R. 493, 21 A.R. 692.

In the first edition of this work (Vol. II., p. 392), it was pointed out that this provision did not confer the right of committal nor the right to order the payment of the debt by instalments, and that the "section would be found insufficient to subject a garnishee to all the consequences of non-payment of a judgment which an ordinary judgment debtor is subject to under the sections referred to." This view was adopted in *Re Dowlery v. Duffy*, 29 O.R. 40, in which it was held that the section has not extended the powers of the judge in respect to the right to commit a garnishee for default in making payments pursuant to sections 243 to 254 of this Act. It was also held in the same case that the affidavit required by section 243 is a condition precedent to the right to examine a garnishee under this section: see notes to section 243 and Rule 200.

256. Every Division Court Clerk shall make a return to the Inspector of Division Courts on or before the 15th day of January in every year, showing the number of judgment debtors who, during the twelve months ending the 31st day of December previously, were ordered to be committed under each of the five heads mentioned in section 247 of this Act. 55 V. c. 11, s. 4.

Annual return of commitment of judgment debtors.

See Rule 181. See also notes to section 69.

ABSCONDING DEBTORS.

Absconding
debtors.

251. In case a person, being indebted in a sum not exceeding \$100, nor less than \$4, for any debt or damages arising upon a contract, express or implied, or upon a judgment,

1. Absconds from this Province, leaving personal property liable to seizure under execution for debt in any County in Ontario, or

2. Attempts to remove such personal property, either out of Ontario or from one County to another therein, or

3. Keeps concealed in any County to avoid service of process, and in case any creditor of such person, his servant or agent makes and produces an affidavit or affirmation to the purport of the form prescribed by the General Rules or Orders from time to time in force relating to Division Courts, and in case the affidavit or affirmation be filed with the Clerk of any Division Court in Ontario, then the Clerk upon the application of the creditor, his servant or agent, shall issue a warrant under the hand and seal of the Clerk, in the form prescribed by such General Rules and Orders, directed to the Bailiff of the Division Court within whose division the same is issued, or to a Constable of the County, commanding the Bailiff or Constable to attach, seize, take and safely keep all the personal estate and effects of the absconding, removing or concealed person within the County, liable to seizure under execution for debt, or a sufficient portion thereof to secure the sum mentioned in the warrant, with the costs of the action, and to return the warrant forthwith to the Court out of which the same issued. R.S.O. 1887, c. 51, s. 249.

[As to certain claims between \$4 and \$200, see sec. 72 (3).]

Absconding Debtors.—The proceeding under this and the following sections respecting absconding debtors is summary in its nature and exceptional in its character. The party taking it should, therefore, be held to a strict exercise of the rights conferred by the statute, and the due observance of all its requirements; *Fletcher v. Calthrop*, 6 Q.B. 891; *Royal Can. Bank v. Matheson*, 6 C.L.J. 11; *Kraemer v. Glass*, 10 C.P. 475; *R. v. Ellis*, 6 Q.B. 506.

Not Exceeding \$100, Nor Less Than \$4.—By section 72, sub-section 1, the increased jurisdiction conferred by paragraph (d) of that section, is extended to proceedings against absconding debtors under this and the subsequent sections of the Act. It will be observed that while this section may be invoked in cases arising within its provisions, for a sum not exceeding \$100 nor less than \$4 "for any debt or damages arising upon any contract, express or implied," section 72, sub-section 2 allows an attachment to issue *only* on claims, "the amount or balance of which

does not exceed \$200, and the amount or original amount of the claim is ascertained by the signature of the defendant, or of the person whom as executor or administrator the defendants represents," and in such cases the attachment may issue and proceedings may be had on a claim of not less than \$4.00, and not more than \$200."

Query.—Does this provision which expressly limits the amount of the claim to \$200 permit the addition of interest as in the case of other claims provided for by clause (d)?

This distinction must be kept in view. The provisions of this section are not confined to *liquidated* damages but apply as well to claims of an unliquidated character, provided they arise in the manner pointed out by the statute. A claim in trespass or trover or for any other actionable wrong would not be within this section.

Proceedings could be taken on a judgment, no matter for what cause obtained. A claim for damages in any action when reduced to judgment, would become a "debt" under this clause: see *Jones v. Thompson*, E.B. & F. 63; *Dresser v. Johns*, 6 C.B.N.S. 429; *Wilson v. Campbell*, 15 P.R. 254, 258.

It is submitted that the word "judgment" here used should not be confined to the judgment of any particular Division Court, and that judgments of the High Court and County Courts (except those which fall within the prohibition of 61 Vic. c. 15, s. 9, *ante* page 377) would also be within its provisions; but a judgment of any court other than that out of which an attachment issued would have to be sued for and recovered upon as any other debt of a like nature: *Re Eberts v. Brooke*, 11 P.R. 296.

Who is an Absconding Debtor.—To abscond is to depart to defraud creditors or avoid service of process.

A debtor could "abscond" from this province to Quebec, or any other province of the Dominion, within this section.

One who might be in Ontario on a temporary sojourn could not be said to be absconding "from this province," on returning to his home: *McPhadden v. Bacon*, 9 C.L.J. 226; *Clement v. Kirby*, 7 P.R. 103; *Kier v. Fletcher*, 13 P.R. 46; see also *Ex parte Gutierrez, Re Gutierrez*, 11 Ch. D. 298; *Butler v. Rosenfeldt*, 8 P.R. 175; *Seane v. Coffey*, 15 P.R. 112; 22 A.R. 269; *Phair v. Phair*, 19 P.R. 67. Where a foreigner is in England for a merely temporary purpose, and is preparing to return home, there is no presumption (as there might be in the case of a domiciled Englishman going abroad) that he is going away with the intention of avoiding the payment of a debt: *Ex parte Gutierrez, Re Gutierrez*, 11 Ch. D. 298. The Master of the Rolls, at page 301, in speaking of an Act in some respects similar in its provisions to ours, says, "The Act is aimed at absconding debtors. A man who goes away does not necessarily abscond. . . . I must say it appears to me that the process of the Court of Bankruptcy has been abused, by which I mean that it has been knowingly used for an improper purpose, contrary to the plain meaning of the Act and the justice of the case."

A defendant who contracts a debt in the United States, his ordinary place of abode, and is in the act of returning there after a visit to his parents in this country, can not be arrested on a charge of leaving Ontario with intent to defraud his creditors: *Smith v. Smith*, 9 P.R. 511; *Elgie v. Butt*, 26 A.R. 13. It is of no consequence where the domicile of a person may be or to what country he is bound by allegiance as a subject or citizen, if he come to this province and reside here and contract debts and is about to quit the country (that is, in effect, about to change his residence to a foreign country, even if that country be his place of domicile) with intention to defraud his creditors, he is subject to arrest

as an absconding debtor in this province: *Kersterman v. McLellan*, 10 P.R. 122; see also *Lamond v. Eiffe*, 3 Q.B. 910.

A defendant cannot rely on a change of residence to a foreign country so as to avoid the law of arrest to which he was subject in this province at the time he incurred the debt upon which the action is brought, when that change of residence has been effected by a fraudulent flight to avoid arrest: *Kersterman v. McLellan*, 10 P.R. 122.

An intention to be temporarily absent on a trip to Europe does not justify an arrest, nor could it be said in such case that a man "absconds": *Shaw v. McKenzie*, 6 S.C.R. 181.

The person must "have personal property liable to seizure under execution" before he is an "absconding debtor," within this section.

To "abscond" merely is not sufficient: *Higgins v. Brady*, 10 U.C.L.J. 268; *Wakefield v. Bruce*, 5 P.R. 77.

There cannot be a judgment against an absconding debtor where there has been no property attached, except upon proper service of the summons: *per Draper, C.J.*, in *Offay v. Offay*, 36 U.C.R. p. 364; see also the notes to section 104 of this Act; *Robertson v. Coulton*, 9 P.R. 16.

Proceedings cannot be taken against an absconding debtor under the Absconding Debtors Act, until after the maturity of the debt: *Kyle v. Barnes*, 10 P.R. 20. It is submitted that the same principle is applicable to proceedings under this Act.

Personal Property Liable to Seizure.—Formerly the general impression seems to have been that there was no exemption of any part of the goods of an absconding debtor: see *R. v. Davidson*, 21 U.C.R. 41. But see now *R.S.O. c. 79*, section 4 (2), and notes to section 234, *ante* pp. 409, *et seq.*

Attempts to Remove.—The mere *intention* of removing personal property would not be sufficient. The *attempt* to remove or removal itself of any part of a debtor's personal property would justify an attachment under this section upon which all the personal estate and effects of the absconding debtor would be subject to seizure or such part as is necessary to secure the sum mentioned in the warrant: *Sharp v. Matthews*, 5 P.R. 10; *Hood v. Cronkite*, 29 U.C.R. 98; *R. v. Collins. L. & C.* 471; *R. v. Johnson*, 34 L.J.M.C. 24; *Ex parte Coates, Re Skelton*, 5 Ch.D. 979; 6 L.C.G. 17.

Keeps Concealed.—This must in every case be a question of fact, and proper inquiries should be made before making the affidavit: see notes to sections 188 and 191. The inference must be that the concealment is for the purpose of avoiding the service of process. If the facts show any other object or intention, the affidavit could not properly be made. A person might be said to be keeping concealed if he remained in his own house, and at his request his presence there was denied by his servants or others, or if being there, he, knowing the object of a process-server refused him admission.

"Concealment by a debtor to avoid the service of summons" was said to involve "an intention to delay or prevent creditors from enforcing their demands in the ordinary legal modes. It may be by the debtor's secreting himself upon his own premises, or by departing secretly to a more secure place, in or out of the county of his residence:" *Dunn v. Salter*, 1 Duv. 345; see also *Frey v. Aultman*, 30 Kansas, 182, 184.

Leaving a place, and requesting that false information of his movements be given, is concealment: *North v. McDonald*, 1 Biss. 59.

In Case any Creditor.—The word "creditor" must be read in connection with the words "for any debt or damages," etc., in the first part of

the section, and cannot be confined to persons having liquidated demands merely.

His Servant or Agent.—The affidavit may be made by one who has express or implied authority to make it. The word "servant" cannot be held to apply to every servant, domestic or otherwise, but to one who, from the nature of his employment, would in this way have an express or implied authority to protect the interests of his master: see *R. v. Cummings*, 4 U.C.L.J. 182.

"An important branch of the duties of clerks is preparing affidavits for and suing out *warrants of attachment*. It is presumed that clerks will be applied to, except in cases of pressing emergency, where it may be indispensable to resort to justices of the peace; indeed, as a general rule, parties have no guarantee for the regularity of the proceeding unless they employ an officer instructed in and familiar with the requirements of law; and as magistrates seldom trouble themselves with such matters, and are not entitled to make any charge for drawing the affidavit and suing out the attachment, it is not probable their services will be sought, save where the defendant's property would be lost unless instant action was taken, and the clerk's office happens to be at a distance. The right to seize a party's property on the plaintiff's affidavit, or his agent's, unsupported by other testimony of the debt and state of facts giving right to attach, though a salutary provision of the law, is liable to abuse; and being an *ex parte* proceeding, the rules regulating the right must be strictly observed:" 1 U.C.L.J. 21. Before issuing an attachment the clerk must see that immediately following the statement in the affidavit of the amount due to the attaching creditor the cause and subject of such indebtedness is properly set forth according to Form No. 26; Rule 29. The form should be adhered to as closely as possible: *Archibald v. Hubley*, 18 S.C.R. 116; *Morse v. Phinney*, 22 S.C.R. 563. The allegation of the intent and design of the debtor being to defraud is necessary in all cases. The statement of the cause of action must be specially set out (*ib.*), and for such statement in issuing attachment: see 1 U.C.L.J. 21 and 41. Unless the affidavit *clearly* makes out a case under the increased jurisdiction provision of section 72, if the sum claimed is in excess of \$100, the creditor and probably the clerk, if a seizure were made, could be held responsible as trespassers: *Quackenbush v. Snider*, 13 C.P. 196. For form of affidavit when the debt is over \$100, see Form 27. Should the affidavit be "for money lent and goods sold and delivered," without showing either that the money was lent, or that the goods were sold and delivered by the creditor to the debtor, it would be insufficient: *Handley v. Franchi*, L.R. 2 Ex. 34; *McKenzie v. Bussell*, 3 O.S. 343. The defendant could waive an irregularity in the affidavit, such as the omission to allege that the proceedings were not taken from any vexatious or malicious motive: *Barrow v. Capreol*, 2 U.C.L.J. 210. An affidavit for attachment which contains more than any one of the three alternatives of the statute is bad, and an attachment issued upon it would perhaps render all parties, except the bailiff, liable as trespassers: *Quackenbush v. Snider*, 13 C.P. 196; so also would they be liable if the warrant were issued without any affidavit: *Caudle v. Seymour*, 1 Q.B. 889; *Gray v. McCarty*, 22 U.C.R. 568. It would not render the affidavit bad, where made before suit commenced, to entitle it in the court: *Hart v. Ruttan*, 23 C.P. 613; *Wakefield v. Bruce*, 5 P.R. 77; see also *Higgins v. Brady*, 10 U.C.L.J. 268.

An attachment would be set aside if issued for money lent, the affidavit not stating by whom: *McKenzie v. Bussell*, 3 O.S. 343; see also *Handley v. Franchi*, L.R. 2 Ex. 34. In the absence of any form setting out the particular cause of action, as given in Form 26, the affidavit should follow as nearly as possible the common affidavit of debt for arrest: *Anon*, 2 O.S. 292. If the promissory note or other cause of

action is fully set out, the indebtedness of the defendant would be alleged with sufficient certainty: *Wakefield v. Bruce*, 5 P.R. 77. The judge has an inherent right to set aside an attachment improperly issued: *Howland v. Rowe*, 25 U.C.R. 467; *Re Mitchell v. Scribner*, 20 O.R. 17.

The necessity for the affidavit being duly made will more strongly appear by a reference to the cases of *Morgan v. Hughes*, 2 T.R. 225; *Stevens v. Clark*, 2 M. & Rob. 435; *R. v. Hughes*, 4 Q.B.D. 614; *McLean v. Bradley*, 2 S.C.R. 535; in addition to *Caudle v. Seymour*, and other cases *supra*. See also notes to section 90, *ante* p. 146.

A common error in regard to these affidavits is the omission to entitle them in the court or cause. There is only one case where an affidavit need not be so drawn in Division Court proceedings, and that is the case of a special summons, when the affidavit is endorsed on the summons (see Form No. 28). The affidavits under this section should conform to the requirements of Rules 262 to 268, *ante* pp. 144-146.

Affidavit or Affirmation to be Filed.—In *Moore v. Gidley*, 32 U.C.R. 233, it was held, in an action against a justice of the peace for trespass in issuing a warrant of attachment, that the transmission of the affidavit to the D.C. clerk was not a necessary condition of his having jurisdiction. The creditor does not appear to be restricted to proceeding in any particular court as he is under section 86: see 1 L.C.G. 54.

Hand and Seal of Such Clerk.—It will be observed that the warrant must be under the hand and seal of the clerk, and not under the seal of the court, as in section 218, in respect to executions: see Rule 8. Rule 29 and Form 60 appear to indicate that where the clerk issues the attachment it should be under the seal of the court. The statute and Form being at variance, the former should govern: *Boyle v. Ward*, 11 U.C.R. 416. Probably the clerk could adopt the court seal as his own: *Ontario Salt Company v. Merchants' Salt Company*, 18 Gr. 551.

Form Prescribed.—See Forms 26 and 27, and Rule 29 for forms of affidavits, and for form of attachment see Form 60.

Before issuing an attachment it is the imperative duty of the clerk to see that immediately following the statement in the affidavit of the amount due to the attaching creditor the cause and subject of such indebtedness is properly set forth according to Form 26. Form 26 is the form of affidavit prescribed by the General Rules and Orders pursuant to this section. The Form should be adhered to as closely as possible: *Archibald v. Hubley*, 18 S.C.R. 116; *Morse v. Phinney*, 22 S.C.R. 563. The allegation of the intent and design of the debtor being to defraud seems to be necessary only when he has absconded.

See also as to the form of such affidavit: *Hagerty v. G. W. Ry. Co.*, 44 U.C.R. 319.

To a Constable of the County.—Any constable of the county would have power to execute the warrant: *Delaney v. Moore*, 9 U.C.R. 294. If the bailiff cannot be found to execute the attachment and a constable is resorted to, care must be taken to see that he is a constable duly appointed: R.S.O. c. 99. Many people consider themselves constables when in law they are not. See section 266, sub-section 2.

Attach, Seize, Take.—See notes to sections 218 and 234.

Liable to Seizure Under Execution.—See also notes to sections 218 and 234. In an action for seizing goods under Division Court attachment, it was proved that a few days before the seizure the goods had been sold by auction under the direction of one of the plaintiffs, who executed a bill of sale to the vendee, witnessed by the auctioneer. Held, that the plaintiff could not afterwards be permitted to set up that the sale was

void because fraudulent as against the plaintiff's creditors, and to maintain trespass for seizing the same goods as if they were his own: *McPhatter v. Leslie*, 23 U.C.R. 573; see *Roberts v. Roberts*, 2 B. & Ald. 367; *Mundell v. Tinkiss*, 6 O.R. 625; but if no bill of sale had been executed and there had in fact been no sale, the result would be different: *Bowes v. Foster*, 2 H. & N. 779; *Taylor v. Bowers*, 1 Q.B.D. 291; *Whitelock v. Cook*, 20 C.L.T. 171.

Should the bailiff or constable seize more than might reasonably be necessary "to secure the sum mentioned in the warrant, with the costs of the action," he (together with the sureties, in the case of the bailiff,) would be liable for an excessive seizure: see *Piggott v. Birtles*, 1 M. & W. 449.

Return the Warrant Forthwith to the Court.—The bailiff should make a written return to the warrant, to be filed with the papers. If nothing has been seized under the attachment, the plaintiff can only proceed as in an ordinary case: *Offay v. Offay*, 26 U.C.R. 364. Sometimes a judgment is attempted to be obtained by attachment in disregard of this rule.

Where there has been no proceeding by summons and a warrant issued by a justice of the peace, it is submitted that the warrant should be returned to the clerk of the court within whose division the affidavit was made or taken: see section 258; 1 L.C.G. 54.

If an attachment is maliciously issued and without probable cause, an action for damages for such wrong would lie at the suit of the debtor against the attaching creditor: *Drake on Attachment*, 5th edition, sections 724-745; *Pollock on Torts*, 234, 235; *Cartwright v. Hinds*, 3 O.R. 384-395.

If there should be reasonable and probable cause for issuing an attachment, the action would not lie, no matter how maliciously issued. If a person has a right to do an act, and does it *maliciously*, yet it is not actionable: *Allen v. Flood*, (1898) A.C. 1.

Should an attaching creditor place the warrant of attachment for execution in the hands of someone unauthorized by statute—for instance, one who is not a duly appointed constable—he would simply be liable as a trespasser.

R.S.O. c. 79, s. 7, enacts as follows:

WHEN DIVISION COURT ATTACHMENT SUPERSEDED.

7 If the sheriff to whom a writ of attachment is delivered for execution, finds any property or effects, or the proceeds of any property or effects which have been sold as perishable, belonging to the absconding debtor named in the writ of attachment, in the custody of a constable or of a bailiff or clerk of a Division Court by virtue of a warrant of attachment issued or money paid into court under a garnishee summons under *The Division Courts Act*, the sheriff shall demand and take from the constable, bailiff or clerk, the property or effects, or the proceeds of any part thereof, and the constable, bailiff or clerk, on demand by the sheriff and notice of the writ of attachment, shall forthwith deliver all the property, effects and proceeds aforesaid to the sheriff, upon penalty of forfeiting double the value of the amount thereof, to be recovered by the sheriff, with costs of suit, and to be by him accounted for after deducting his own costs, as part of the property and effects of the absconding debtor; but the creditor who has duly sued out the warrant of attachment may proceed to judgment against the absconding debtor in the Division Court, and on obtaining judgment, and serving a memorandum of the amount thereof, and of the costs to be certified under the hand of the clerk of the Division Court, the creditor shall be entitled to satisfaction in like

manner as, and in ratable proportion with the other creditors of the absconding debtor who obtains judgment as hereinafter mentioned.

See this section applied, *Re Moore v. Wallace*, 13 P.R. 201.

The Creditor's Relief Act, R.S.O. c. 78, s. 25, enacts:

25. (1) If the sheriff does not find property of a debtor leviable under executions and claims in his hands sufficient to pay the same in full, and the sheriff finds goods and chattels in the hands of the bailiff of a Division Court under a writ of execution or attachment against the debtor, the sheriff shall demand and obtain the goods and chattels from the bailiff, who shall forthwith deliver the same to the sheriff, with a copy of every writ of execution in his hands against the debtor, and a memorandum showing the amount to be levied thereunder, including the bailiff's fees so far as proceedings have been taken by him, and showing the date upon which each writ was received by him.

(2) In case the bailiff fails to deliver any of the goods, he shall pay double the value of the property retained, such double value to be recovered by the sheriff from the bailiff with costs of suit, and to be by the sheriff accounted for as part of the estate of the debtor.

(3) The costs and disbursements of the bailiff shall be a first charge upon the goods, and shall be paid by the sheriff to the bailiff upon demand, after being taxed by the Division Court Clerk.

(4) The sheriff shall distribute the proceeds among the creditors under the provisions of this Act, and the Division Court execution creditors shall be entitled, without further proof, to stand in the same position as execution creditors whose writs are in the sheriff's hands: 43 Vic. c. 10, s. 9.

A writ of execution from the High Court or County Court would, on the authority of *Francis v. Brown*, 11 U.C.R. 558, and under the Creditor's Relief Act entitle the sheriff to seize goods then in the possession of a Division Court bailiff under attachment; but it is submitted, after a careful perusal of the authorities here cited, and especially the judgment of Draper, C.J., at p. 565 of 11 U.C.R.; of Hagarty, J., in *Fisher v. Sulley*, 3 U.C.L.J. 89; of Draper, J., in *Potter v. Carroll*, 9 C.P. at p. 448, and looking at the object and scope of the Division Court's Act, that an execution from a Division Court, at the suit of another creditor, does not take priority of the attachment and authorize a seizure of such goods on the execution to the prejudice of the attaching creditor.

The principle of *Francis v. Brown* is, that the Legislature did not by the Division Court Act expressly take from an execution creditor in a Superior Court the rights against a debtor's goods which his writ gave him. No such reason, it is submitted, can be found for giving an execution priority over an attachment where both issue from the Division Court, and where neither one has precedence of the other. The goods are, it is to be observed, in the custody of the law, and cannot, it is submitted, during such time be again seized under Division Court process: *King v. MacDonald*, 15 C.P. 397; see *Carroll v. Potter*, 19 U.C.R. 346; *Daniel v. Fitzell*, 17 U.C.R. 369; *Putnam v. Price*, 1 L.C.G. 77; *Paton v. Seram*, 1 L.C.G. 93; 2 U.C.L.J. 172; 2 L.C.G. 49, 63; *Nicol v. Ewin*, 7 P.R. 331.

By the attachment the creditor obtains a lien on the goods seized to the extent of his claim, which the 262nd section preserves to him until his execution issues, and then gives him, as against Division Court creditors, priority of execution: see *Tate v. Corp. of Toronto*, 3 P.R. 181; *Caron v. Graham*, 18 U.C.R. 315.

238. Any County Judge, or a Justice of the Peace for the County, may take the affidavit in the last preceding section mentioned, and upon the same being filed with the Judge or Justice, the Judge or Justice may issue a warrant under his hand and seal in the form prescribed as aforesaid, and the Judge or Justice shall forthwith transmit the affidavit to the Clerk of the Division Court within whose division the same was made or taken, to be by him filed and kept among the papers in the cause. R.S.O. 1887, c. 51, s. 250.

When
County
Judge or
Justice of
the Peace
may issue
attach-
ments, etc.

Justice of the Peace for the County.—From the notes to the previous section will be seen the danger that justices of the peace run in issuing warrants of attachment; their safest course is to allow the clerk of the court to perform a duty which properly belongs to him. It is only in cases of necessity that a justice of the peace should grant the warrant. "Under the Division Courts Act, the creditor has a choice in cases of attachment to apply to any magistrate, or to the clerk of the court, to issue the warrant. The divisions are so small throughout the country, and the clerk's office is usually so near a creditor's residence, generally in the same or an adjoining township, that rarely is there any cogent necessity for applying to a magistrate rather than the clerk; and the saving of a few miles against the risk of error is rather heavy odds for a plaintiff to take. Applying to a clerk, he comes to an officer experienced in the work—one who has all the forms before him, and whose friendly word of caution will often save a plaintiff from getting himself into difficulty. It is not so when he applies to a magistrate, who is not and cannot be expected to be familiar with the Division Court procedure. The propriety, therefore, of employing the clerk seems obvious enough. Let no suitor be persuaded by a magistrate to come to him on such a business; and perhaps it may somewhat damp ardour in this particular if we mention the fact that a magistrate is not entitled to any fee under the statute for doing the work:" 9 U.C.L.J., page 318.

"The simplicity so necessary to the working of Division Courts has, in some cases, had the effect of allowing thoughtless or unscrupulous persons to work injuries, which are not so likely to occur in courts of higher jurisdiction. In the higher courts, to which we refer, the preliminary steps must come before the judge; whereas in Division Courts many important measures are taken under the supervision of the clerks only, or even indeed before a justice of the peace. Of course, when process is issued by the clerks, there is a strong element of safety, and almost a certainty that the proceedings will be regular in form; but, in the case of justices no such security exists, as the records of the courts plainly show. Our attention has been called more especially to the issuing of writs of attachment, as well at the instance of thoughtless persons, who do not sufficiently consider the step they are about to take, as by unscrupulous creditors, who use the ready machinery of the court as an instrument to terrify those with whom they have to deal into submitting to such terms as they may think proper to impose. The Board of County Judges, in preparing their forms, have studied to provide that all the requisites of the statute should be complied with, and have made it necessary that the party seeking to have the writ issued should swear positively to the fact and nature of the indebtedness, and that the debtor has absconded, or has attempted to remove his property out of the province or county, or that the debtor keeps concealed with intent to defraud the creditor of his debt; and the creditor must also swear that he does not act from a vexatious or malicious motive. Now, if the requirements of the statute are carefully considered, and the affidavit

carefully read over before swearing, much of the evil that has arisen would be avoided; of course this would not deter persons who were so disposed from wilfully using the writ as, we might almost say, an instrument of torture:" 6 L.C.G. 17; see also 3 U.C.L.J. 61.

It is submitted that the *filing* by the justice is a necessary condition to the proper issue of the warrant; *Magrath v. Todd*, 26 U.C.R. at p. 90; *Lee v. Morrow*, 25 U.C.R. 610; *Westbrook v. Clagahan*, 12 C.P. 616; *R. v. Shaw*, 23 U.C.R. 616; *Re Meyers and Wannicott*, 23 U.C.R. 611; *R. v. Armytage*, L.R. 7 Q.B. 773; *James v. The S.W.Ry. Co.*, L.R. 7 Ex. 287.

It was held however in *Moore v. Gidley*, 32 U.C.R. 233, that the omission by the justice of the peace to transmit the affidavit to the Division Court clerk did not render him liable as a trespasser, though the neglect to do so might render him liable for a breach of duty.

Bailiff or
constable
to seize and
make
inventory.

259 Upon receipt of the warrant by the Bailiff or Constable, and upon being paid his lawful fees, including the fees of appraisement, the Bailiff or Constable shall forthwith execute the warrant, and make a true inventory of all the estate and effects which he seizes and takes by virtue thereof, and shall within twenty-four hours after seizure, call to his aid two freeholders, who being first sworn by him to appraise the personal estate and effects so seized, shall then appraise the same and forthwith return the inventory attached to the appraisement to the Clerk of the Court in which the warrant is made returnable. R.S.O. 1887, c. 51, s. 251.

Including the Fees of Appraisement.—The lawful fees of the bailiff including fees of appraisement, must be paid to the bailiff or constable before execution of the warrant. It is his option to exact them, but if he waives prepayment he would be bound to execute the warrant and be as responsible as if he had exacted prepayment of his fees.

See section 56 for fees of appraisers.

Forthwith Execute the Warrant.—Enquiry should be made by the bailiff as to the property intended to be seized, and, if perishable, it will be proper for him to require security under section 272: but generally, on receipt of a warrant directed to him, the bailiff is forthwith to execute the same: that is to say, he is to proceed with all diligence to seize such personal property of the debtor as may be taken under the ordinary writ of execution, or a sufficient portion thereof to *secure* the sum mentioned in the warrant, with costs. A difficulty may occur with respect to other creditors coming in afterwards, and it is not easy to lay down any rule as to the amount of property the bailiff should attach. If he has knowledge of any other creditors coming in, it would seem proper to seize enough to cover the claims of all: but in any case let the bailiff take ample property to cover, at a forced sale, the debt and costs in the case in which he acts. It may be that an enlarged meaning ought, in construction, to be given the word *secure* as used in section 257: but we will not pursue the point at present, as it opens several nice questions. Having seized, the bailiff's first duty is to make an inventory of the property. For form of inventory see Form 317.

The inventory made, the bailiff within twenty-four hours thereafter, calls to his aid two freeholders, and swears them to appraise the property seized: 1 U.C.L.J. 22. The form of oath will be found at Form No. 232. A memorandum thereof should be then endorsed on the inventory as follows:

On the _____ day of _____ A.D. 19____, T.T. of _____ and N.N. of _____ were sworn by me well and truly to appraise the goods, chattels, property and effects mentioned in this inventory.

B.F.

Bailiff.

The freeholders then examine the property as pointed out to them by the bailiff, and having valued the same, their appraisalment should be endorsed on the inventory: 1 U.C.L.J. 22. The form of this endorsement will be found at Form 232. The appraisers must be sworn *before* they make the appraisalment: *Kenney v. May*, 1 M. & Rob. 56. If the bailiff should sell without an appraisalment, he would be liable to an action, but the sale would not be void: *Lyon v. Weldon*, 2 Bing. 334; *Campbell v. Coulthard*, 25 U.C.R. 621. The bailiff could not be an appraiser: *Westwood v. Cowne*, 1 Stark. 172; nor the attaching creditor: *Andrews v. Russell*, Bull. N.P. 81.

Court in Which the Warrant is Made Returnable.—This, it is submitted, means to the clerk of the court within whose division the affidavit for attachment was made or taken whether by himself or a justice of the peace: see section 258.

260. In any case commenced by attachment in a Division Court, the proceedings may be conducted to judgment and execution in the Division Court of the division within which the warrant of attachment issued. R.S.O. 1887, c. 51, s. 252.

Proceedings may be continued in court out of which attachment issued.

The Division Within Which the Warrant of Attachment Issued.—Reading this section in connection with section 258, it will be seen that the legislature presupposes the affidavit to be "made or taken" and the warrant of attachment to be issued within the same division. Should the affidavit be taken in one division and the warrant issued in another, there would be some inconvenience about the custody of the papers.

261. Where proceedings have been commenced in any case before the issue of an attachment, the proceedings may be continued to judgment and execution in the Division Court within which the proceedings were commenced. R.S.O. 1887, c. 51, s. 253.

Proceedings commenced before attachment to continue

The proceedings by attachment, in this case, supplement the action previously commenced.

262. The property seized upon a warrant of attachment shall be liable to seizure and sale under the execution to be issued upon the judgment, or in case the property was perishable, and has been sold, the proceeds thereof shall be applied in satisfaction of the judgment. R.S.O. 1887, c. 51, s. 254.

Property attached may be sold under execution.

The Property Seized.—As to seizure and sale of property on execution, see sections 218, 234, 235, 259.

Replevin is not maintainable by the debtor against whom the attachment issues: R.S.O. c. 66, s. 3. But it is maintainable by a third party: *Arnold v. Higgins*, 11 U.C.R. 191: the action would, however, be stayed

upon the issue of an interpleader summons under section 277: *Caron v. Graham*, 18 U.C.R. 315. See also notes to section 72, sub-section 5, *ante* pp. 91-95.

Applied in Satisfaction of the Judgment.—This section provides for two cases: (1) If there is judgment in the case, the party in whose favor it is, may have the property seized and sold under execution. (2) If the goods are perishable, and have been sold, the proceeds of them shall be applied in satisfaction of the judgment.

This provision is varied by Rule 30, which provides that where several judgments have been recovered against an absconding debtor it shall not be necessary to issue execution upon each such judgment; but one execution against the property seized upon the attachment shall issue for the sale thereof to satisfy the judgments of those creditors, and enough of such property as shall be sufficient to satisfy the said judgments and costs, may be sold thereunder according to law. (Form 132a). Or if the property has been previously sold as perishable, enough of the proceeds may be applied by the clerk to satisfy such judgments and costs, without execution. But one execution should, therefore, be issued and all judgment creditors will be entitled to share. Notice of the attachment in each case must be given within one month after the issue of the first attachment, to the clerk of the court out of which the first attachment issued or in which it was made returnable: see sections 264, 265.

As to sale of perishable property see sections 272 and 273.

Plaintiff
not to
divide
cause of
action.

263. No plaintiff shall divide any cause of action into two or more actions for the purpose of bringing the same within the provisions of the six preceding sections, but a plaintiff having a cause of action above the value of \$100 and not exceeding \$200 for which an attachment might be issued if the same were not above the value of \$100 may abandon the excess, and upon proving his case, may recover to an amount not exceeding \$100 and the judgment of the Court in such case shall be in full discharge of all demands in respect of such cause of action, and the entry of judgment therein shall be made accordingly. R.S.O. 1887, c. 51, s. 255.

No Plaintiff Shall Divide any Cause of Action.—As to dividing any cause of action into two or more actions for the purpose of bringing the same in the Division Court, see section 79 and notes, *ante* pp. 120-125.

The fact that there has been a splitting of demands must be taken advantage of by the defence in the first action: *Public School Trustees of Nottawasaga v. Township of Nottawasaga*, 15 A.R. 310.

May Abandon the Excess.—Where the excess is abandoned, it must be done in the first instance on the claim: Rule 7; *Re Higginbotham v. Moore*, 21 U.C.R. 326; *Re McKenzie v. Ryan*, 6 P.R. 323. But where such has not been done the judge may permit the plaintiff to amend his claim before or at the trial, upon such terms as he thinks fit: Rule 7; notes to section 71, *ante* p. 64; notes to section 79, *ante* p. 125. But the judge cannot be compelled by *mandamus* to exercise his discretion to permit amendment: *Re White v. Galbraith*, 12 P.R. 513.

Upon Proving His Case.—It is submitted that if personal service of the summons, and of detailed particulars of the plaintiff's claim were made, the judge might in his discretion give judgment without further proof: see sections 123, 269 and 270 and notes.

Other attaching creditors may enter defence, set-off or counterclaim in the same way and to the same extent as the debtor himself could do: Rule 28; see notes to section 193, *ante* p. 349.

If the defendant be not personally served, the trial could not take place until a month after the seizure under the attachment: Rule 27.

No form is given for the minute of judgment, but it can be easily drawn up from the facts of the case.

264. In case several attachments issue against any party, then subject to the provisions contained in section 7 of *The Act respecting Absconding Debtors*, the proceeds of the goods and chattels attached shall not be paid over to the attaching creditor or creditors according to priority, but shall be ratably distributed among such of the creditors suing out such attachments as obtain judgment against the debtor, in proportion to the amount really due upon such judgments; and no distribution shall take place until reasonable time, in the opinion of the Judge, has been allowed to the several creditors to proceed to judgment. R.S.O. 1887, c. 51, s. 256.

If several
attach-
ments
issued.

Rev.
Stat. c. 79.

Several Attachments.—Where several persons sue out warrants of attachment, each one may enter a defence, set-off, or counterclaim, and call and examine and cross-examine witnesses, etc., in the same way and to the same extent as the debtor himself might do, were he personally to appear and defend the suit, on any ground whatever: Rule 28.

Where several judgments have been recovered, it is only necessary to issue one execution upon which the property may be sold to satisfy the judgments (Form 132*a*), and enough of such property to satisfy the judgments may be sold thereunder; or if the property has been previously sold as perishable, enough of the proceeds may be applied by the clerk to satisfy such judgments and costs, without execution: Rule 30; see notes to section 263.

The proceeds of the execution, or of the sale of the property, shall, after deducting all costs, remain in the hands of the clerk and be distributed ratably amongst such creditors as are entitled to share therein to the extent of their claims, and the surplus, if any, shall be paid to the person entitled thereto: Rule 31.

If there is not enough money to satisfy all claims in full, the bailiff's fees and the costs taxed, and the costs of the execution only, are to be first deducted, and paid to the creditor under whose attachment or execution the seizure and levy were made, and the balance is to be applied ratably to the payment of the debts and costs of the creditors: Rule 31 (*a*).

By the first clause of the rule, the costs of all creditors are to be deducted only when there is sufficient money to satisfy all claims in full.

Clause (*a*) is not very clearly expressed, but it is submitted that it is intended that the costs of the first attaching creditor are to be paid in full, he being the creditor at whose instance and under whose attachment the seizure was made, and that the costs of the execution, being an execution for the benefit of all, are also to be paid in full, irrespective of the action in which it is issued. To prevent difficulty, the execution should always issue in the action of the first attaching creditor: see *Darling v. Smith*, 10 P.R. 360; *Hughes v. Field*, 9 P.R. 127.

Wages to the extent of three months take precedence of other claim where an attachment is made by a sheriff under The Absconding Debtor's Act, R.S.O. c. 79; R.S.O. c. 156, s. 5; but that provision does not apply to an attachment in the Division Court, upon which all creditors share ratably.

Scheme of Distribution.—The clerk is required, before distributing the money, to prepare a list of the attaching creditors with the amount due each for principal, interest, and costs, the total amount to be distributed, and the amount going to each according to such ratable distribution: Rule 31 (b). Notice must then be delivered or sent (prepaid and registered) by the clerk to each creditor, and the clerk is required to keep the list open for examination for five days after sending the notice (the day of sending the notice is not to be reckoned), and if after ten days no objection has been filed, the list shall be binding on all parties, and the clerk may proceed with the distribution: Rule 31 (d).

Order to Vary Scheme of Distribution.—Any party entitled to or interested in the money may apply to the judge for an order to correct or change such distribution: Rule 31 (c).

No time is limited within which the application for the order should be made nor is any power given to the clerk to distribute the amount not affected by the objection: compare The Creditor's Relief Act, R.S.O. c. 78, s. 32. No provision is made for the costs of the contestation nor for procedure in such a case. It is submitted that the application should be made within a reasonable time, and in the event of no application being made, notice might be given to the party filing the objection that an application would be made to the judge to confirm the scheme and for an order for distribution, unless an application were made within a time limited by the judge to correct or change the same. For forms of plan of distribution, notice thereof, and order changing the plan respectively, see Forms 311, 312 and 289.

An order made by the judge to vary the scheme of distribution is made by him as *persona designata* and is not the subject of appeal: *Re Simpson and Clafferty*, 18 P.R. 402, following *Re Young*, 14 P.R. 304; *Re Paquette*, 11 P.R. 463. The necessary disbursements and expenses of the bailiff for keeping the goods attached form a first charge upon them and are deductible from the total proceeds before any distribution is made: see section 266. The words "the amount really due upon such judgments" include costs as well as debt and interest, and should be included in the amount for which each creditor is entitled to rank on the fund in the hands of the clerk unless, of course, there is sufficient to pay every one in full and, in this respect, the rule by giving priority for costs to the creditor at whose instance and under whose attachment or execution the seizure or levy was made, seems to conflict with the express terms of the section.

As to creditors who participate in the distribution, see section 265.

To Proceed to Judgment.—See notes to section 257 and Rules 27, 28.

If goods
insufficient
to satisfy
claims of
all attach-
ing
creditors.

265. Where the goods and chattels are insufficient to satisfy the claims of all of the attaching creditors, no such creditor shall be allowed to share unless he sued out his attachment, and within one month next after the issue of the first attachment, gave notice thereof to the Clerk of the Court out of which the first attachment issued, or in which it was made returnable. R.S.O. 1887, c. 51, s. 257.

Within One Month Next After.—A calendar month is here meant: see Interpretation Act, s. 8, (15); and the day on which the first attachment issued would not be reckoned as part of the time: *Hann v. Johnston*, 3 O.R. 100; notes to section 152, *ante* p. 285. See *Macfie v. Pearson*, 8 O.R. 745.

Notice Thereof to the Clerk.—This notice is required now to be in writing: section 97; Rule 240. It is doubtful if depositing the notice in the post-office would be sufficient if it did not reach the clerk until after the month had expired. We think that if the post-office is used, it is at the risk of the party, and if the clerk does not receive the notice, it is not given.

266.—(1) All the property seized under the provisions of the preceding nine sections, shall be and remain in the custody and possession of the Bailiff to whom the warrant of attachment is issued, and he shall take and keep the same until disposed of by law, and he shall be allowed all necessary disbursements and expenses for keeping the same.

Custody of
goods seized
under
attachment

(2) Where the property is seized under the provisions of the preceding nine sections by a County Constable, it shall be forthwith handed over to the custody and possession of the Bailiff of the Court, out of which the warrant of attachment issued, or into which it was made returnable; and such Bailiff shall take the same into his charge and keeping and shall be allowed all necessary disbursements for keeping the same. R.S.O. 1887, c. 51, s. 258.

Shall Remain in Custody and Possession of the Bailiff.—Formerly the property seized was required to be handed over to the custody and possession of the clerk, but it is now to remain in the custody and possession of the bailiff to whom the warrant of attachment issued, who is to take and keep the same until disposed of by law.

If property is seized by a county constable it is to be forthwith handed over to the bailiff as provided in sub-section 2; and if the bailiff did not seize the goods himself, but they were delivered to him by a county constable, neither trover, trespass nor replevin would lie against him: *Caron v. Graham*, 18 U.C.R. 318; see R.S.O. c. 66, s. 3.

The bailiff would be bound to use ordinary care, diligence and prudence in keeping possession. He might insure the goods or the attaching creditor might do so. He would not, however, until in possession on an execution, be an insurer himself: *Sinclair's Absconding Debtors*, 73, 74; *Ross v. Grange*, 25 U.C.R. 396; *Giblin v. McMullin*, L.R. 2 P.C. 317.

Necessary Disbursements.—The clerk should observe great care in this matter by seeing that the bailiff does not overcharge for keeping possession of the goods attached.

What are "necessary disbursements and expenses," must, of course, depend on the circumstances of the case, and must be determined by the clerk, subject to the revision of the judge: section 47; Rule 174.

The bailiff is required in addition to the formal return to give a correct and full statement *in detail* of his fees and disbursements in the execution of the attachment: Rule 188.

On what
terms goods
attached
may be
restored.

267. In case a person against whose estate or effects such attachment has issued, or any person on his behalf, at any time prior to the recovery of judgment in the cause, executes and tends to the creditor who sued out the attachment, and files in the Court to which the attachment has been returned a bond with good and sufficient sureties, to be approved of by the Judge or Clerk, binding the obligors, jointly and severally, in double the amount claimed, with a condition that the debtor (naming him) will, in the event of the claim being proved and judgment recovered thereon, as in other cases where proceedings have been commenced against the person, pay the same, or the value of the property so taken and seized, to the claimant or claimants, or produce the property whenever thereunto required, to satisfy the judgment, the Clerk may supersede the attachment, and the property attached shall then be restored. R.S.O. 1887, c. 51, s. 259.

A Bond with Good and Sufficient Sureties.—Except the attachment is set aside by order of the judge, the only method by which the debtor can gain possession of his goods is by giving a bond under this section.

One surety would be sufficient: Interpretation Act, section 8, sub-section 20.

If, however, the bond should be drawn naming two sureties, and but one executed it, the bond could not be received, for it would be a good defence to the surety who signed to show that he believed, owing to the form of the bond, that it would be executed by the other: *Hansard v. Lethbridge*, 8 T.L.R. 346; and a plaintiff is entitled to a bond free from possible objections of that kind: *Jones v. Macdonald*, 14 P.R. 535: see also notes to section 36, *ante* pp. 23, 30.

To be Approved of By the Judge or Clerk.—Properly this should only be done after notice to the opposite party. The rights given to the creditor by attachment should not be taken away without an opportunity of his showing cause against it, if so advised: notes to section 188, *ante* p. 342.

For form of bond: see Form 187. For affidavit of execution thereof: see Form 35. For form of approval of bond: see Form 249. For form affidavit of justification of sureties: see Form 265.

Value of the Property so Taken and Seized.—The obligors would only be liable for the lesser sum, whichever it might be.

If an action had to be brought on the bond, the plaintiff could not reasonably claim more than the value of the goods as estimated by the appraisers: see notes to section 36.

No provision is made for re-delivery of the goods on payment of the amount claimed and costs. Such a course is frequently adopted when the possession of the goods is important to the debtor, or to a third party who may be owner thereof. It is submitted that the money so paid, is not paid voluntarily, but may be recovered back on showing that the goods were improperly seized, either by reason of the attachment being improperly issued, or that the goods were not the property of the debtor: *Little v. Dundas and Waterloo Road Co.*, 2 C.P. 399; *DeCadaval v. Collins*, 4 A. & E. 858; *Pitt v. Coomes*, 2 A. & E. 459; *Clark v. Woods*, 2 Ex. 395; *Parker v. The G.W. Ry. Co.*, 7 M. & G. 253; *Close v. Phipps*,

7 M. & G. 586; Valpy v. Manley, 1 C.B. 596; Green v. Duckett, 11 Q.B.D. 275; McKay v. Howard, 6 O.R. 135; Chandler v. Sanger, 114 Mass. 364; Cobb v. Charter, 32 Conn. 358.

When the goods of a third party are lawfully seized for the debt of another, such third party is entitled to indemnity from the debtor, though there may be no agreement to indemnify, and though there may be in that sense no privity between the owner of the goods and the debtor: Edmunds v. Wallingford, 14 Q.B.D. 811; see Herring v. Wilson, 4 O.R. 607, which, however, was founded on England v. Marsden, L.R. 1 C.P. 529, which is questioned in Edmunds v. Wallingford, *supra*.

If the third party should pay the money to the bailiff in order to obtain possession of the goods, the bailiff might interplead as to them: Smith v. Critchfield, 14 Q.B.D. 873.

A seizure by a landlord, of the goods attached, as a distress for rent, would be no answer to an action on the bond: Rapelje v. Finch, 14 U.C.R. 249. Nor would it be a performance of the condition, under such circumstances, to say to the obligee that he might go and take goods out of the possession of the landlord at his peril: s. c. 14 U.C.R. 468.

268. If within one month from the seizure as aforesaid, the person against whom the attachment issued, or some one on his behalf, does not appear and give such bond, execution may issue as soon as judgment has been obtained upon the claim or claims, and the property seized upon the attachment, or enough thereof to satisfy the judgment and costs may be sold for the satisfaction thereof, according to law, or if the property has been previously sold as perishable under the provisions hereinafter made, enough of the proceeds thereof may be applied to satisfy the judgment and costs. R.S.O. 1887, c. 51, s. 260.

Sale of goods if the debtor does not appear and give security.

Perishable goods.

Within One Month.—This would be exclusive of the day of the seizure: Young v. Higgon, 6 M. & W. p. 53; McCrae v. Waterloo M.F. Ins. Co., 26 C.P. 437; note to section 265, *ante* p. 449; and see Rule 27.

As Soon as Judgment has been Obtained.—This provision is probably made in order to save expense. It is submitted that the judge could not postpone the issuing of execution in such a case as this, and that sections 152 and 153 would not apply.

May be Sold.—See notes to sections 238, 239 and 240; see also Rules 30 and 31 and notes to section 264.

As Perishable.—See notes to section 271.

269. Where the property of any person has been seized under a warrant of attachment as aforesaid, and a summons has been personally served on such person before seizure then the trial of the cause shall be proceeded with as if no such warrant of attachment had been issued, and after judgment execution shall forthwith issue unless otherwise ordered by the Judge. R.S.O. 1887, c. 51, s. 261.

Where attachment issues and summons is served personally.

Has Been Seized.—See notes to section 218 and 234.

Personally Served.—See notes to section 103, as to personal service. It is to be observed that this section only makes provision where service is made *before* seizure. If the service has not been personal the trial shall not take place until one month after seizure: Rule 27.

Execution Shall Forthwith Issue Unless Otherwise Ordered By the Judge.—Contrast the language of section 268 as to the issuing of execution.

Section 152, restraining the issue of execution for fifteen days would not apply to a case under this section.

Proceed-
ings against
debtors
where pro-
cess not
previously
served.
Stat.
c. 79.]

220. Subject to the provisions contained in sections 5 and 7 of *The Act respecting Absconding Debtors*, in order to proceed in the recovery of any debt due by the person against whose property an attachment issues, where process has not been previously served, the same may be served either personally or by leaving a copy at the last place of abode, trade or dealing of the defendant, with any person there dwelling, or by leaving the same at such place if no person be there found; and in every case all subsequent proceedings shall be conducted according to the usual course of practice in Division Courts; and if it appears to the satisfaction of the Judge on the trial upon affidavit, or other sufficient proof, that the creditor who sued out an attachment had not reasonable or probable cause for taking the proceedings, the Judge shall order that no costs be allowed to the creditor or plaintiff and no costs in such case shall be recovered in the cause. R.S.O. 1887, c. 51, s. 262.

Sections 5 and 7 of the Act Respecting Absconding Debtors.—See R.S.O. c. 79, pp. 930, 931. Section 7 of the Act respecting Absconding Debtors will be found in the notes to section 257, *ante* p. 443.

The following is the other section of that Act here referred to:

PERISHABLE PROPERTY.

5. In case horses, cattle, sheep, pigs, or perishable goods or chattels, or such as from their nature (as timber or staves) cannot be safely kept or conveniently taken care of, are taken under a writ of attachment, the sheriff who attached the same shall have them appraised and valued, on oath, by two competent persons; and in case the plaintiff desires it and deposits with the sheriff a bond to the defendant executed by two freeholders (whose sufficiency shall be approved of by the sheriff), in double the amount of the appraised value of the articles, conditioned for the payment of the appraised value to the defendant, his executors or administrators, together with all costs and damages incurred by the seizure and sale thereof, in case judgment is not obtained by the plaintiff against the defendant, then the sheriff shall proceed to sell all or any of such enumerated articles at auction, to the highest bidder, giving not less than six days' notice of the sale, unless any of the articles are of such a nature as not to allow of that delay, in which case the sheriff may sell such articles last mentioned forthwith; and the sheriff shall hold the proceeds of the sale for the same purposes as he would hold property seized under the attachment.

As to application of the proceeds of sale, see Rules 30 and 31, and notes to section 264, *ante* p. 449, and notes to sections 271, and 277, as to sale of perishable property.

Has Not Been Personally Served.—See notes to sections 103 and 113. If the defendant has not been personally served the trial shall not take place until one month after seizure, unless the judge otherwise orders: Rule 27; see sections 268 and 269.

At the Last Place of Abode.—See notes to sections 86, 103, 113 and 243 as to service of process.

The Usual Course of Practice.—See notes to section 269.

Reasonable and Probable Cause.—If a man honestly believes in the case which he lays before a judicial tribunal, such belief being based on an honest conviction of the existence of circumstances which would lead any fairly cautious man to such belief, he has reasonable and probable cause for his action: *Chntfield v. Comerford*, 4 F. & F. 1008; *Walker v. S. E. Ry. Co.*, L.R. 5 C.P. 640; *Lister v. Perryman*, L.R. 4 H.L. 521; *Bank of B.N.A. v. Strong*, 1 App. Cas. 307; *Abrath v. N.E. Ry. Co.*, 11 Q.B.D. 440; 11 App. Cas. 247; *Broad v. Ham*, 5 N.C. 725, *per Tindal, C.J.*; *Shorsbery v. Osmaston*, 37 L.T. 792; *Hicks v. Faulkner*, 8 Q.B.D. 167; *Shaw v. Mckenzie*, 6 S.C.R. 181; *McGill v. Walton*, 15 O.R. 389; *Webber v. McLeod*, 16 O.R. 609; *Hope v. Evered*, 17 Q.B.D. 338; *Lee v. Charnington*, 23 Q.B.D. 45, 272; *Howard v. Clarke*, 20 Q.B.D. 558; *Hamilton v. Cousineau*, 19 A.R. 293; *Archibald v. McLaren*, 21 S.C.R. 588; *Charlebois v. Surveyor*, 27 S.C.R. 556; *Leary v. Saxton*, 28 N.S.R. 278; *St. Denis v. Shoultz*, 25 A.R. 131; *Malcolm v. Perth, M.F. Ins. Co.*, 29 O.R. 406, 717.

The Judge Shall Order.—This is imperative on the judge.

That no Costs be Allowed.—This is a penalty which the judge may impose for the improper issue of an attachment. It would not effect the right of action against the attaching creditor for improperly issuing an attachment: *Erickson v. Brand*, 14 A.R. 614.

Setting Aside Attachment.—Power over the process of his own court is inherent in the judge of a Division Court as well as of other courts; and notwithstanding the provisions of this section, a judge may set aside an attachment which has been improperly issued: *Re Mitchell v. Scribner*, 20 O.R. 17.

271. Subject to the provisions contained in sections 5 and 7 of *The Act respecting Absconding Debtors*, in case horses, cattle, sheep or other perishable goods have been taken upon an attachment, the Bailiff of the Court who has the custody or keeping thereof (the same having been first appraised, in the manner in section 259 of this Act mentioned), may at the request of the plaintiff who sued out the warrant of attachment, expose and sell the same at public auction, to the highest bidder, giving at least eight days' notice at the office of the Bailiff of the said Court, and at two other public places within his division, of the time and place of the sale, if the articles seized will admit of being so long kept, otherwise he may sell the same at his discretion. R.S.O. 1887, c. 51, s. 263.

Perishable goods how disposed of.

Rev. Stat. c. 79.

Sections 5 and 7.—See notes to section 270, *ante* p. 454, for section 5 and notes to section 257, *ante* p. 443, for section 7 of the Act respecting Absconding Debtors.

Perishable Goods.—It is submitted that the *ejusdem generis* principle is not applicable in a case of this kind, and that "perishable goods" should not be read as signifying property of the same kind or like description as those specifically mentioned in the words preceding them; but would include lumber exposed to the weather, fruit, fish, vegetables or other chattel property of a perishable nature: *Bank of Nova Scotia v. Ward*, 20 N.S.R. 230; *Cork and Bandon Ry. Co. v. Goode*, 13 C.B. 836. Shares in a limited company may be "of a perishable nature or likely to injure from keeping" within a rule similar to Rule 36: *Evans v. Davies*, (1893) 2 Ch. 216.

Willes, J., said in *Fenwick v. Schmalz*, L.R. 3 C.P. at p. 315, in reference to the construction to be placed on a statute, "that if the particular words exhaust the whole genus, the general word must refer to some larger genus;" see *Stroud* 542-548; *Sun Fire Office v. Hart*, 14 App. Cas. 98; *Brewers and Maltsters' Assn. v. Atty.-Gen. for Ontario*, (1897) A.C. 231.

Having Been First Appraised.—See notes to section 277. For form of inventory see Form 317; for forms of oath and appraisalment to be endorsed on inventory see Forms 232, 233.

At the Request of the Plaintiff.—The request is a necessary condition of the sale. As remarked by *Coleridge, J.*, in *R. v. Ellis*, 6 Q.B. 506, "the inflexible rule attaches, that under a special power parties must act strictly on the conditions under which it is given."

For his own protection the bailiff had better take the "request" in writing.

At Least Eight Days.—This means "clear days;" see note to section 158; *Rumohr v. Marx*, 3 C.L.T. 31.

The goods must be exposed and sold at public auction and to the highest bidder. Any informality in the conduct of the sale would not invalidate it, though it might subject the bailiff to an action, if damages were sustained in consequence: *Campbell v. Coulthard*, 25 U.C.R. 621; see notes to section 239, *supra* p. 416.

May Sell the Same at His Discretion.—A discretion is here vested in the bailiff in regard to the sale of perishable property which cannot be safely kept for eight days, and if he did not exercise his discretion within the limits to which an honest man, competent to the discharge of his office, ought to confine himself, and damage ensued, he and his sureties would be responsible for it on their covenant: see 6 U.C.L.J. 250; *Wilson v. Rastall*, 4 T.R. 757.

Care should be taken that the notice of sale is duly given according to law: see notes to section 238, *supra* p. 415.

See also notes to section 277 as to sale of perishable property.

Creditors
before sale
to give bond
to indem-
nify the
defendant.

272. It shall not be compulsory upon the Bailiff or Constable to seize, or upon the Bailiff to sell such perishable goods, until the party who sued out the warrant of attachment has given a bond to the defendant therein, with good and sufficient sureties in double the amount of the appraised value of the goods, conditioned that the party directing the seizure and sale will repay the value thereof, together with

all costs and damages incurred in consequence of the seizure and sale, in case judgment be not obtained for the party who sued out such attachment, and the bond shall be filed with the papers in the cause. R.S.O. 1887, c. 51, s. 264.

Has Given a Bond.—If the officer neglects to obtain this bond, and proceeds to sell perishable goods it will be at his own risk. He would not be entitled to indemnity from the plaintiff unless the latter directed the sale: *Barker v. Furlong*, (1891) 2 Ch. 185; see 6 U.C.L.J. 250.

For form of bond see Form 188.

273. The moneys so made shall be by the Bailiff paid over to the Clerk, and the residue, if any, after satisfying such judgments, with the costs thereupon, shall be delivered to the defendant or his agent, or to any person in whose custody the goods were found; and the responsibility of the Clerk in respect of such property shall cease. R.S.O. 1887, c. 51, s. 265.

Application of proceeds of sale.

Shall Be Delivered to the Defendant or His Agent.—The residue of the money, if any, after satisfying all judgments and costs, must be paid over as the section requires. If not so paid the person entitled could maintain an action therefor, or might take summary proceedings under section 285.

Responsibility of the Clerk.—The responsibility which attaches to the clerk by reason of the improper or illegal issue of the process is not covered by this provision, and the last clause is somewhat ambiguous. The "clerk" probably was intended originally to mean "bailiff," but even if this were so the transposition of these words could not be made according to the rules of judicial construction: see judgment of Denman, C.J., *Greene v. Ward*, 7 Q.B. 178; *Morgan v. Thomas*, 9 Q.B.D. 643. The possession and responsibility for the property seized under attachment is vested in the bailiff and no responsibility in that behalf attaches to the clerk. His responsibility is limited to the proper application of the moneys paid over to him by the bailiff.

Distribution of Moneys.—The proper method of distributing the proceeds in cases where there are several attachments is provided for by Rule 31, and is fully discussed in the notes to section 264, *ante* p. 449.

274. A bond given in the course of any proceeding under this Act may be sued in any Division Court of the County wherein the same was executed, and proceedings may be thereupon carried on to judgment and execution in such Court, notwithstanding the penalty contained in the bond may exceed the sum of \$100. R.S.O. 1887, c. 51, s. 266.

Enforcing security given under Act.

May Be Sued in any Division Court.—In order to retain the Division Court as that in which certain proceedings relative to that court may be sued, it is here provided that a bond given in the course of any proceeding under the Act may be sued in any Division Court of the county wherein the same was executed. It matters not what the penalty of the bond may be—whether otherwise beyond the jurisdiction of the court or not—it is by this section made suable in that court. This would not deprive a party of the right to sue upon such bond in any higher court,

except at the risk of losing and having to pay the costs of such court: *Kennin v. Maedonald*, 22 O.R. 484.

In an action on any such bond by the assignee of the bailiff, set-off could be pleaded, the penalty of the bond being considered as the debt: *McKelvey v. McLean*, 34 U.C.R. 635.

Since the existence of counterclaim, we see no reason why a defendant should not have the right to set the same up in such action.

See also notes to sections 36, *ante* pp. 27-29 and notes to section 72 (5), *ante* pp. 102 *et seq.*

Delivery of
bond to
party
entitled.

275. Every such bond shall be delivered up to the party entitled to the same, by the order and at the discretion of the Judge of the Court, to be enforced or cancelled as the case may require. R.S.O. 1887, c. 51, s. 267.

Enforced or Cancelled.—When a bond given in any Division Court proceeding has served its purpose, the judge of the court may order the same to be delivered up, to be enforced, or cancelled, as the case may require. The right to the bond will depend upon the fact whether judgment has been given for or against the attaching creditor on the claim for which he attached: see condition of bond in Forms 187, 188.

CLAIMS OF LANDLORDS AND OTHERS IN RESPECT TO GOODS SEIZED.

Interpreta-
tion of
"Land-
lord."

276.—(1) In the next six sections, the word "landlord" shall include the person entitled to the immediate reversion of the land, or, if the property be held in joint tenancy, coparcenary or tenancy in common, shall include any one of the persons entitled to the reversion; and

"Agent."

(2) The word "agent" shall mean any person usually employed by the landlord in the letting of lands or in the collection of the rents thereof, or specially authorized to act in any particular matter by writing under the hand of the landlord. R.S.O. 1887, c. 51, s. 268.

Joint-Tenancy, Coparcenary or Tenancy in Common.—The person entitled to the "immediate reversion," would be any person entitled to the property immediately on the determination of the lease, as, for instance, a tenant who has sub-let would be the immediate reversioner: see *Laird v. Briggs*, W.N. (1880) 205.

"Joint-tenancy" is a unity of interest, title, time and possession, that is, joint-tenants have one and the same interest accruing by one and the same conveyance, commencing at the same time and held by one and the same undivided possession. One tenant cannot sue or be sued without joining the other; nor do any act to defeat or injure the other's estate; nor, at common law, have an action of waste or of account against his co-tenant.

Upon the death of one tenant the estate remains to the survivor. The estate is destroyed by severing any one of the unities, and then becomes a tenancy in common.

"Coparcenary" is where two or more persons together form one heir. They have distinct estates, with right to possession in common; and each may alien his share. It has practically no existence in this province, as since 1852, co-heirs take as tenants-in-common.

"Tenants in common," are such as hold by several and distinct titles, but by unity of possession; because none knows his own severalty, and therefore, all occupy promiscuously. One tenant may hold in fee-simple, the other in fee-tail or for life; or one may hold by descent, the other by purchase, or each by purchase from a different quarter; or the estate of one may have been vested for fifty years, and that of the other for a single day. The only unity is that of possession, because no man can certainly tell which part is his own. They take by distinct moieties; no one has any entirety of interest; hence, there is no survivorship between them. As they differ from estates in severalty only in having the possession blended, the estate is dissolved by uniting all interests in one tenant, or by partition of the interests: Bl. Com. 191-194.

222.—(1) In case a claim be made to or in respect of any goods or chattels, property or security, taken in execution or attached under the process of a Division Court, or in respect of the proceeds or value thereof, by a landlord for rent, or by a person not being the party against whom the process issued, then, subject to the provisions of *The Act respecting Absconding Debtors*, the Clerk of the Court, upon application of the officer charged with the execution of the process, may, whether before or after an action has been brought against such officer, issue a summons calling before the Court out of which the process issued, or before the Court holden for the division in which the seizure under the process was made, as well the party who issued the process as the party making the claim, and thereupon any action which has been brought in the High Court or in a local or inferior Court in respect of the claim, shall be stayed.

Claims of landlord, etc., to goods seized in execution, how to be adjusted.

Rev. Stat. c. 70.

(2) The Court in which the action has been brought, or a Judge thereof, on proof of the issue of the summons, and that the goods and chattels or property or security were so taken in execution or upon attachment, may order the party bringing the action to pay the costs of all proceedings had upon the action after the issue of the summons out of the Division Court.

Costs.

(3) The County Judge having jurisdiction in such Division Court shall adjudicate upon the claim, and make such order between the parties in respect thereof, and of the costs of the proceedings as to him seems fit; and shall also adjudicate between the parties, or either of them, and the officer or Bailiff in respect of any damage or claim of or to damages arising or capable of arising out of the execution of the process by the

County Judge to adjudicate on claims.

officer or Bailiff, and make such order in respect thereof, and of the costs of any proceedings as to the Judge shall seem fit; and the order shall be enforced in like manner as an order made in an action brought in the Division Court, and shall be final and conclusive between the parties and as between them and the officer or Bailiff, except that upon the application of either the attaching or execution creditor or the claimant, or the officer or Bailiff, within fourteen days after the trial, the Judge may grant a new trial upon good grounds shown, as in other cases under this Act, upon such terms as he thinks reasonable, and may in the meantime stay proceedings.

Where more than one execution or attachment has issued.

(4) In case the Bailiff has more than one execution or attachment at the suit or instance of different persons against the same property claimed as aforesaid, it shall not be necessary for the Bailiff to make a separate application on each execution or attachment; but he may use the names of such execution or attaching creditors collectively in such application, and the summons may issue in the name of the creditors as plaintiffs.

Power to award damages.

(5) Under the provisions of subsection 3 of this section the Judge shall have power to adjudicate upon and award damages, even though the amount of the damages claimed, found or awarded should be beyond the jurisdiction of a Division Court.

Rights of parties as to defence and as to costs.

(6) In respect of any damages claimed, or of any judgment, order or finding under the provisions of subsections 3 and 5 of this section the parties and the Bailiff applying, shall have the same rights of defence and counterclaim, including in all cases the right and liability to costs, as would exist had an action, within the jurisdiction of the Division Court, been brought to recover the said damages. R.S.O. 1887, c. 51, s. 269.

Principles of Interpleader.—At one time the claim had to be of a legal nature: *Sturgess v. Claude*, 1 Dowl. 505; *Hurst v. Sheldon*, 13 C.B.N.S. 750; but that is not so now. The court will look at equitable as well as the legal rights of the claimant: *Duncan v. Cashin*, L.R. 10 C.P. 554; *McIntosh v. McIntosh*, 18 Gr. 58; *Schroeder v. Hemrott*, 28 L.T. 704; *Dominion Bank v. Davidson*, 12 A.R. 90; *Connell v. Hickok*, 15 A.R. 518; see also *Carter v. Long*, 26 S.C.R. 430. It is competent for the claimant to show any facts warranting him to interfere with the process of execution even if the property in the goods be in another, provided always that this will not work a surprise upon the execution creditor and that the claimant appears to be in privity with a claiming under the real owner: *Bryce v. Kinnie*, 14 P.R. 509.

The claim must be made by a third party. A claim of lien is within the statute: *Ford v. Baynton*, 1 Dowl. 357; *Rogers v. Kennay*, 9 Q.B. 592; or other special claim to the goods: *Muckleston v. Smith*, C.P. 401.

So also if the goods are seized in the possession of a stranger: *Allen v. Gibbon*, 2 Dowl. 292.

A married woman may sustain a claim on interpleader: *Shingler v. Holt*, 7 H. & N. 65; R.S.O. c. 163, ss. 3 and 15; see *Hogaboom v. Grundy*, 16 P.R. 47, *infra*.

Interpleader proceedings apply to foreigners residing abroad: *Attenborough v. London & St. Katharines Dock Co.*, 3 C.P.D. 450; *Belmont v. Aynard*, 4 C.P.D. 352; *The Credits Gerundense (Ltd.) v. Van Weede*, 12 Q.B.D. 171; *Re Con. Life Assn. v. Cordingley*, 19 P.R. 16. But the court has no power to direct foreigners to come within its jurisdiction to defend their right to a fund, under an agreement as to property in Ontario, payable in a foreign country, to foreigners residing there by a person also residing therein, but claimed by a party within the jurisdiction: *Re Benfield v. Stevens*, 17 P.R. 399; see *Harris v. Bank of B.N.A.* 36 C.L.J. 29.

Growing crops are liable to seizure and sale and therefore, can be the subject of an interpleader issue in Division Courts: *Ingrain v. Taylor*, 7 A.R. 216; *Grass v. Austin*, 7 A.R. 511; *Hamilton v. Harrison*, 46 U.C.R. 127; *Hayden v. Crawford*, 3 O.S. 583; *Campbell v. Cushman*, 4 U.C.R. 9; *Hamilton P. & L. Co. v. Campbell*, 5 O.R. 371.

And an interpleader may be allowed, notwithstanding that the specific property, such as grain, could not be delivered owing to its being mixed with other property of the same description: *Re C.P. Ry. Co. v. Caruthers*, 17 P.R. 277.

If the bailiff were placed in circumstances which gave him an interest on either side he could not interplead: *Duddin v. Long*, 3 Dowl. 139; 1 Bing. N.C. 299; *Ostler v. Bower*, 4 Dowl. 605, as where he has taken an indemnity from one party: *Adams v. Blackwell*, 10 P.R. 168; *Thompson v. Wright*, 13 Q.B.D. 632. Nor where he has brought about the claim: *Cox v. Balne*, 2 D. & L. 718. Nor where he has been guilty of neglect, and in consequence incurred a liability: *Braekenbury v. Laurie*, 3 Dowl. 180; *Millar v. Nolan*, 1 C.L.J. 327.

The Crown cannot be compelled to interplead: *McGee v. Baines*, 3 U.C.L.J. 151; *Candy v. Maugham*, 6 M. & G. 710.

Where the goods have passed to an assignee in insolvency, see *O'Callaghan v. Cowan*, 41 U.C.R. 272.

The bailiff is entitled to interpleader unless he has acted dishonestly, or his conduct has prejudiced either party: *Holt v. Frost*, 3 H. & N. 821.

In the case of an execution against one personally, he may as executor make claim to the goods, and such is the subject of interpleader: *Fenwick v. Laycock*, 2 Q.B. 108.

The interpleader summons must be taken out before money is paid over to the creditor, though the bailiff had notice before: *Anderson v. Calloway*, 1 C. & M. 182.

If the claimant has possession of the goods at the time of seizure, even though lent to him, that is sufficient, *prima facie*, to sustain his claim, and if the creditor wishes to show a higher right in himself he must displace the *prima facie* title which possession gives: *Green v. Stevens*, 2 H. & N. 146; *Shingle v. Holt*, 7 H. & N. 65; *Porter v. Flintoft*, 6 C.P. 337; *Mason v. Morgan*, 24 U.C.R. 328; see Rule 32 (a) *infra*.

Execution creditors in the Division Court should be made parties to interpleader proceedings in the High Court: *Maefie v. Hunter*, 9 P.R. 149.

An action of trespass may be brought pending an interpleader issue: *per Denman, C.J.*, *Hooke v. Ind. Coope & Co.*, 36 L.T. 467. But under the provisions of this section it would be immediately stayed on the issue of the interpleader summons: sub-section 1; *Smith v. Critchfield*, 14 Q.B.D. 873.

Where more goods are seized than claimed, the claimant must, in his particulars, specify the particular goods which he claims: Rule 33; Price v. Plummer, 26 W.R. 45; Plummer v. Price, 39 L.T. 657.

Where on a claim being made to goods seized, the execution creditor does not direct the bailiff to give up the goods to the claimant but appears and contests his title in interpleader proceedings, it was held no evidence of a ratification by the creditor of the bailiff's detention: Toppin v. Buckerfield, 1 C. & E. 157.

Under this Act, if the bailiff sells the goods without the claimant's consent, he cannot interplead for the proceeds: Reid v. McDonald, 26 C.P. 147; Darling v. Collatton, 10 P.R. 110.

The claimant might pay the amount of the execution and the bailiff might then interplead as to the moneys: Paris Manufacturing Co. v. Walls, 10 P.R. 138; Smith v. Critchfield, 14 Q.B.D. 873.

Abandonment.—Should the bailiff, with the consent of the execution creditor and the claimant, temporarily withdraw from possession the goods would no longer be under seizure, and a landlord could distrain upon them for rent, although he knew that the interpleader proceedings were pending: Cropper v. Warner, 1 C. & E. 152; see Craig v. Craig, 7 P.R. 209; Flynn v. Cooney, 18 P.R. 621.

If, having seized goods in execution which are claimed by another party, he delivers up part of the goods, the title to them being the same as the others, he, "in fact colludes with the party to whom he delivers them up," and disentitles himself to relief: Braine v. Hunt, 2 Dowl. 391.

Nor can the bailiff interplead where the goods are claimed by a third party after the bailiff withdraws from the seizure: Holton v. Guntrip, 3 M. & W. 145. Nor where the goods are under distress for rent, as they are then in the custody of the law, and the bailiff has no right to seize them: Haythorn v. Bush, 2 Dowl. 641.

Except under the provisions of Rules 35 or 37 a bailiff, under our law has no alternative but to keep possession of the goods or chattels seized, and should he take a bond from the debtor and allow him to remain in possession or otherwise abandon the possession the rights of other creditors or of a landlord would prevail: Anderson v. Henry, 29 O.R. 719; Roe v. Roper, 23 C.P. 76; Williams v. Gray, 23 C.P. 561; Blates v. Arundel, 1 M. & S. 711; Darby v. Waterlow, L.R. 3 C.P. 453, and cases cited, *supra*. But see Anderson v. Henry, 29 O.R. 719, and other cases cited *ante* p. 384.

Should the execution creditor be prejudiced by the bailiff's abandoning the seizure, the latter would be liable: Maclean v. Anthony, 6 O.R. 330; and the goods would, in case of doubt, be presumed to be sufficient to satisfy the execution: Donnelly v. Hall, 7 O.R. 581. The bailiff is not required to retire from the possession of goods he has seized because an interpleader summons has issued: *Ex parte* Summers, 18 Jur. 522.

As to what is an abandonment of the seizure, see notes to section 218, *ante* p. 383.

Taken in Execution or Attached.—Goods must be "taken in execution or attached," that is, they must be seized before a bailiff can interplead: Goslin v. Tune, 2 U.C.R. 177; Ogden v. Craig, 10 P.R. 378; Rules 32, 35.

Proceeds or Value Thereof.—This is analogous to money in the sheriff's hands about which interpleader can be had; Scott v. Lewis, 2 C.M. & R. 289; Hall v. Kiscock, 11 U.C.R. 9; Booth v. Preston & Berlin Ry. Co., 6 U.C.L.J. 57; Smith v. Critchfield, 14 Q.B.D. 873.

But under this section there can only be an interpleader "in respect of the proceeds or value" where a claim is made to the same; and should the claim be made to the goods, there could be no interpleader as to

the proceeds: *Reid v. McDonald*, 26 C.P. 299; see also *McArthur v. Cool*, 19 U.C.R. 476; *Watson v. Henderson*, 6 P.R. 299; unless sold by consent of the claimant: *Darling v. Collatton*, 10 P.R. 110.

By a Landlord for Rent.—Should the bailiff, for instance, have reason to believe that a landlord's claim for rent was merely fictitious, or that no rent was due, or in any such case, then it would be his duty to interplead. The party claiming must virtually be a third party: *Fenwick v. Laycock*, 2 Q.B. 108; 3 U.C.L.J. 197-214; 4 U.C.L.J. 12-38.

The execution creditor is not liable for the seizure: *Walker v. Olding*, 1 H. & C. 621; *Tinkler v. Hilder*, 4 Ex. 187; unless directed by him or his agent: *Wilkinson v. Harvey*, 15 O.R. 346.

In *Slaght v. West*, 25 U.C.R. 391, it was held that a solicitor has implied authority to direct a seizure, but the contrary was held in *Smith v. Kent*, 9 Q.B.D. 340; and a solicitor retained to collect a debt is not entitled to interplead without a further retainer for that purpose: *Hackett v. Bible*, 12 P.R. 482. Rule 35 (d) recognizes the status of a solicitor or agent in interpleader proceedings in the Division Court, by providing that service of the interpleader summons may be made upon them.

Application for Interpleader Summons.—The summons shall be issued by the clerk on the application of the bailiff: Rule 32 and Rule 35 (d). The bailiff should apply as soon as possible: *Cook v. Allen*, 2 Dowl. 11.

"The clerk ought not, without the application of the bailiff, to have issued the summons:" *R. v. Doty*, 13 U.C.R. p. 400; see *Greatorix v. Shackle*, (1895) 2 Q.B. 249; but if both parties appear the objection would be waived: *Id.*

Every bailiff deeming it necessary to seek the protection of an interpleader should act promptly in the issuing of a summons. He may proceed either in the court from which execution issued, or the court for the division in which he makes the seizure, when it happens that the seizure is made in another division. The application to the clerk should be in writing, and care should be taken to obtain the correct name and address of the claimant. The goods claimed should also be specified, and the reasonable value set down to guide the clerk in rating the fees, and for the information of the court. The date of the seizure should also be named. The following, or a form to the like effect, would answer:

Bailiff's application for Interpleader Summons.

In the Division Court, County of
Between *A.B.*,
C.D.,
and
Plaintiff,
Defendant.

By virtue of a writ of execution (or "attachment") in this cause, dated the _____ day of _____, 19____, from this court, I did on the _____ day of _____, 19____, seize and take in execution (*specify goods, chattels, &c.*) claimed as the property of the defendant, the following goods and chattels, viz., one horse and, &c., the whole about the value of _____ dollars. *E.F.* of the township of _____ &c., now claims the same as his property. You will therefore be pleased to issue an interpleader summons to the plaintiff and to the said *E.F.* according to the statute in that behalf.

To _____ clerk of the _____ Division Court, County _____
Dated, &c.: 4 U.C.L.J. 38. Bailiff.

The issue of the interpleader summons does not remove the case from the control of the court: *Wicks v. Wood*, 26 W.R. 680.

Issue of Summons.—If the goods, etc., were seized or attached while in possession of the claimant the case shall proceed as if the creditor were

the plaintiff and the claimant were the defendant. In all other cases it shall proceed as if the claimant were the plaintiff and the creditor were the defendant: Rule 32 (a). This rule adopts in stringent form the rule of decision now prevailing in the High Court: *Duncan v. Tees*, 11 P.R. 66, 296; *Dominion L. & S. Co. v. Kilroy*, 7 C.L.T. 87. It rejects the distinction suggested in *Doran v. Toronto Suspender Co.*, 14 P.R. 103, that when the claimant claims by transfer from the execution debtor he should be required to prove his title.

The question to be tried when the execution creditor is plaintiff is, whether the goods were, at the time of the seizure, exigible under his execution: *Duncan v. Tees*, 11 P.R. 296; in other words, "were they the property of the debtor?" *Wingfield v. Fowlie*, 14 O.R. 102; see also *Doyle v. Lasher*, 16 C.P. 263; *Van Every v. Ross*, 11 C.P. 133; *Culloden v. McDowell*, 17 U.C.R. 359; *McDowell v. McDowell*, 10 U.C.L.J. 48; *Watts v. Howell*, 21 U.C.R. p. 259; *Merchants' Bank v. Herson*, 19 C.L.J. 353; 10 P.R. 117. But it is immaterial who is plaintiff, the object of the proceeding being to inform the conscience of the court whether the creditor has a right to seize the goods: *Mucklestone v. Smith*, 17 C.P. 405; *Edwards v. English*, 7 E. & B. 564; *Bryce v. Kinnee*, 14 P.R. 509.

The practice of making an execution creditor plaintiff is extremely inconvenient, and is frequently productive of much injustice: *per* *Armour*, C.J., 14 O.R. 107.

Where husband and wife live together in the same house, the husband being the owner or tenant, he is in apparent possession, and the wife claiming household furniture, not being for her personal use, must be made plaintiff: *Hogaboom v. Grundy*, 16 P.R. 47. But the stock of goods of a business conducted in the name of the wife, though by the husband under a power of attorney, are in her possession: *Dominion L. & S. Co. v. Kilroy*, 7 C.L.T. 87; and see *Ramsay v. Margett*, (1894) 2 Q.B. 18.

Court from which Summons to Issue.—Under the provisions of clause (c) of Rule 35, the summons shall be issued from the court from which the process issued, or the court holden for the diversion in which the seizure under the process was made, at the option of the bailiff, and the creditor and claimant shall be summoned to such court, but subject to the power of the judge to change the place of trial. Prior to this rule the claim would have to be adjudicated upon in the court from which the execution issued, or in which the seizure was made: *Washington v. Webb*, 16 U.C.R. 232. Now, however, the bailiff has the option of saying before which court the summons shall be returnable, "subject to the power of the judge, in his discretion, to change the place of trial." But it seems doubtful whether any clerk, other than the one who issues the process, can issue the interpleader summons.

Change of Place of Trial.—The judge "in his discretion" has power to change the place of trial. This is the only case in which a discretionary power is given to the judge to change the place of trial of proceedings in the Division Court. In other cases the place must be changed on certain facts appearing, or the court will cease to have jurisdiction. The place of trial should not be changed unless the preponderance of convenience would be in favor of the other division to that chosen by the bailiff: *Peer v. Northwest Transportation Company*, 14 P.R. 341; *Berlin Piano Co. v. Traaishch*, 15 P.R. 68; *Brethour v. Brooke*, 15 P.R. 205; *Dowie v. Partlo*, 15 P.R. 313; *Standard Drain Pipe Co. v. Fort William*, 16 P.R. 404; *Madigan v. Ferland*, 17 P.R. 124; *Campbell v. Doherty*, 18 P.R. 243. Instead of changing the place of trial, the judge may, under his discretionary power over costs, apportion the costs of the trial so as to do

justice: *McArthur v. Michigan Central Railway Co.*, 15 P.R. 77; *Roberts v. Great Northern Railway Co.*, (1891) 2 Q.B. 194.

See notes to section 213, *ante* p. 372.

Stay of Proceedings.—When interpleader process is issued, the effect is to arrest all proceedings in any action that may have been commenced against the bailiff connected with the claim.

The regularity of the proceedings in the Division Court will not be enquired into on an application to stay proceedings: *Finlayson v. Howard*, 1 P.R. 224. An action of replevin for the same goods about which an interpleader issue was tried will be stayed: *Caron v. Graham*, 18 U.C.R. 315. The application to stay proceedings can only be made *before the adjudication* on the interpleader summons; if made after, it will be refused, and the defendant can only plead the adjudication: *Schamehorn v. Traske*, 30 U.C.R. 543; see *Harmer v. Cowan*, 23 U.C.R. 479.

Under the power to stay proceedings the court or judge has power to stay the action against the execution creditor as well as the officer: *Carpenter v. Pearce*, 27 L.J. Ex. 143, and the words of the statute here are imperative.

Service of Summons.—The summons shall be served in such time and manner as is directed for service of an ordinary summons to appear: Rule 32. The service of an ordinary summons is regulated by sections 100 and 101, and Rules 16, 17 and 192. See notes to these sections and also notes to section 103 for manner in which service is to be effected. The service may also be made upon the claimant and creditor or upon any solicitor or agent who acts for any claimant or creditor: Rule 35 (*d*).

Particulars of Claim.—Particulars of claim must be delivered by the claimant to the bailiff, or left at the clerk's office, within five days (see notes to section 205, *ante* p. 364,) *after* the service of the summons; such particulars must specify the property claimed, the grounds of the claim, *i.e.*, how and by what right the claimant asserts his title, and in case of a claim for rent must show the amount thereof, the period for which it is claimed and the terms of holding; but the judge may, by consent of all parties, or without consent if he so direct, try the interpleader claim, although the rules may not have been complied with: Rule 33. Particulars delivered *before* the service of the summons would not be a compliance with the rule: *Thwaites v. Wilding*, 11 Q.B.D. 421; 12 Q.B.D. 4.

A claim to certain goods, stating that they had been assigned to the claimant by deed, giving the date and parties, is sufficient, although it does not appear that the deed was good as against creditors: *R. v. Richards*, 2 L.M. & P. 263.

Goods having been seized under an execution issued out of a County Court were claimed by a third party, who delivered particulars of his claim. The judge refused to adjudicate on the claim, on the ground that the particulars did not distinguish that portion of the goods seized to which the claimant was entitled. *Held*, that he should have determined what part the claimant was entitled to, and given judgment accordingly: *R. v. Stapleton*, 15 Jur. 1177; 21 L.J.Q.B. 8, s. e. A notice that goods "are and were my own property, and not the property of R.," is not a compliance with the rule. In *Heston v. McGeorge*, 18 L.T. 109, it is held that the claim need not specify the goods, but in *Richardson v. Wright*, L.R. 10 Ex. 367, the court was equally divided upon the question: *Beswick v. Boffey*, 9 Ex. 315; *R. v. Chilton*, 15 Q.B. 220; *Ex parte Tanner*, 19 L.J.Q.B. 318. The question is, do the particulars tend to mislead? *Ex parte McFee*, 9 Ex. 261. For form, see Form 168.

If the claimant shall not have delivered particulars of claim the judge may, upon such terms as he may direct, allow him to deliver the same: Rule 34. This read with section 124 and Rule 250 empowers the judge to adjourn the trial and proceedings to enable the claimant to comply with the rule: see also Rules 3 and 239.

If the particulars are insufficient the judge should order their amendment: *R. v. Chilton*, 15 Q.B. 220; *Fraser v. Fothergill*, 14 C.B. 298. If he should erroneously decide that they are insufficient and decide against the claimant he may be compelled by mandamus to hear the case: *R. v. Richards*, 2 L.M. & P. 263; *Churchward v. Coleman*, L.R. 2 Q.B. 18; *Whitehead v. Proctor*, 2 H. & N. 352; or he may be prohibited from proceeding on the judgment pending the interpleader: *Ex parte McFee*, 9 Ex. 261.

Particulars of Damages Claimed.—When damages are claimed under subsection 3, "for or in respect of the seizure of the property" the claimant shall state in his particulars of claim the amount and the ground upon which he claims such damages: Rule 35(a); and when damages are claimed against a bailiff arising out of the execution of any process the claimant must deliver to the bailiff a notice of such claim stating the grounds and amount thereof five clear days before the trial: Rule 35(b).

The language used in the rule is: "For or in respect of the seizure of the property." The language of the statute is: "In respect of any damage or claim of, or to damages arising or capable of arising out of the execution of the process." There may be damages arising from a sale or from some misconduct of the officer. The rule does not compel the claimant to state the amount or grounds of his claim to these, although the Act requires the judge to adjudicate upon them. Power is given by Rule 34 to the judge to enlarge the time for giving particulars of claim to the goods, and Rule 239 gives ample powers of amendment of particulars delivered; but it would appear that if no claim to damages is made by the particulars, there is no power to enlarge the time. See notes as to Rule 25, *ante* p. 162; see also notes *ante* p. 143.

Security for Costs.—In every case in which an execution or attachment has been issued to a bailiff who has seized property as belonging to a judgment or absconding debtor, if the bailiff finds there is an incumbrance or lien upon the property, or a claim made thereto as provided for in this section the bailiff must forthwith notify the party who issued the process of such incumbrance, lien or claim: and if such party insists upon the bailiff maintaining the seizure, he is required to deposit with the clerk a sufficient sum of money to indemnify the clerk and bailiff against their costs of an interpleader; otherwise the bailiff may in his own discretion abandon the seizure, and the party who issues the process shall be barred unless the judge otherwise orders: Rule 35(f). No time is limited within which the creditor is to elect whether the bailiff is to maintain or relinquish the seizure. When the sheriff makes a seizure the execution creditor is given 7 days to admit or dispute the claim: and the English C.C. Rules, 1889, Ord. XXVII., r. 1, require the execution creditor to send notice to the bailiff in due course of post.

It is submitted that under this rule notice should be given to the clerk or bailiff within a short period, otherwise the expense of maintaining possession (for which the bailiff would have no indemnity) would soon be as much, or greater, than the costs of interpleader.

The bailiff owes no duty to the claimant to obtain security for costs. He may interplead without notice to the plaintiff of the incumbrance, lien or claim, or he may abandon the seizure if the security for costs be not given. As to what constitutes an abandonment, see notes to section 218, *ante* pp. 383, 384.

The effect of the creditor's failure to deposit the costs is to bar any claim he may have under that execution to the goods seized. This is tantamount to an adjudication that such goods, as against the creditor, are the property of the claimant. There could be no further seizure after abandonment except by order of the judge. A motion for such an order should ordinarily be on notice, as the claimant's position might, in the meantime, have been altered on the faith of the creditor being barred.

Order for Sale.—The judge may, upon the application of any party to any action or matter pending in the court, make an order for the sale by the bailiff or any person named in such order, and in such manner and on such terms as he may think reasonable, of any goods, cattle, property, wares or merchandise which may be of a perishable nature or which incur charges for food or keeping or which for any other just and sufficient cause it may be proper to have sold at once: Rule 36. This rule is applicable to any goods seized under execution or attachment, as well as to interpleader proceedings. The order should only be made on notice to the debtor, claimant, and other parties interested. Any reasonable notice would be sufficient. The English Rule (Ord. XII. r. 11) allows the application to be made *ex parte*. By the sale a good title would be conferred on the purchaser although the goods should be shown to be the property of the claimant: *Godlock v. Cousins*, (1897) 1 Q.B. 348, 558.

Liability of Sale.—The sale being the act of the court, neither the execution creditor, the bailiff, nor other person making the sale would be liable for any special damage caused by it. The liability would be confined to the seizure and the time between it and the order: *Walker v. Olding*, 1 H. & C. 621; *Abbott v. Richards*, 15 M. & W. 194; *Lister v. Northern Ry. Co.*, 19 C.P. 408; *Kennedy v. Patterson*, 22 U.C.R. 556; *Reid v. Gowans*, 13 A.R. 501.

Advertisement of Sale.—The sale should not be advertised as being under the execution but under the order of the judge.

Proceeds.—The order should provide for payment of the proceeds, after deducting expenses, into court: see Form 291. The liability for the expenses of sale may be disposed of after the determination of any contest as to the title to the goods: *Reid v. Murphy*, 12 P.R. 338; *Goodman v. Blake*, 19 Q.B.D. 77.

Any Other Just or Sufficient Cause.—Under a similar rule, a horse, which was the subject of an action for breach of warranty, was ordered to be sold pending the trial: *Bartholomew v. Freeman*, 3 C.P.D. 316; and shares in a limited company: *Evans v. Davies*, (1893) 2 Ch. 216; see notes to section 271, *ante* p. 456.

Claimant May Regain Possession.—The claimant may regain possession of the property seized by depositing with the bailiff the value of the property seized, or the amount for which the seizure has been made; the sum so deposited to be paid into court to abide judges' decision. In case of disagreement as to the value of the property the matter shall be decided by the clerk or judge: Rule 35 (g). Under the English Act, 51 and 52 Vic. c. 43, section 156, from which this is taken, the claimant may give a bond for the value of the goods claimed. Under this rule the bailiff can only restore the goods to the claimant upon the money being deposited with him.

If a claimant pay money into court under this rule and fails, and the creditors takes the money out of court, and the same is insufficient to satisfy his judgment, he cannot on that judgment, seize the goods a second time. "By the payment into court, the claimant does not acquire any property in the goods; but the judgment creditor, by taking out of court the money paid in by the claimant, elects to accept the money in lieu of the goods, and is thereby estopped from afterwards denying that,

as against himself, the goods were the goods of the claimant;" *Haddow v. Morton*, (1894) 1 Q.B. 95, 565. "It is not necessary to determine what might be the result if the judgment creditor had seized the goods a second time on another judgment: *per Lord Esher, M.R., Ib.*, p. 567. See also *Kotehie v. Golden Sovereigns, Ltd.*, (1898) 2 Q.B. 164.

The method by which the clerk or judge may arrive at a decision as to the value of the property is not provided. It is submitted that the clerk and judge have equal power, and that the decision of either is final. There is no right of appeal to the judge from the decision of the clerk. The bailiff and the claimant should each attend before the clerk or judge when the question of value is decided if the decision is arrived at from evidence. It would, however, be competent to arrive at it from a view of the property: *Collins v. Collins*, 26 Beav. 306; *Bos v. Helsham*, L.R. 2 Ex. 72; *Re Dawdy*, 15 Q.B.D. 426.

Claimant May Prevent Sale by Making a Deposit.—If the claimant wishes to prevent a sale, he must, in making his claim, deposit with the bailiff the value of the goods claimed, such value to be fixed by appraisement in case of dispute, to be paid into court to abide the final result of the proceedings; or the costs of keeping possession of the goods until such decision can be obtained: Rule 37. There is no provision made as to the method of appraisement, but it is submitted that the procedure prescribed in section 250 may be followed. For form of appraisement see Form No. 233. As to the deposit of the value of the goods see note *supra*.

"The costs for keeping possession" are the "reasonable allowances and disbursements necessarily incurred in the care and removal of the property;" see tariff of bailiff's fees, item 13. The bill of disbursements should be submitted to the clerk for taxation, subject to appeal to the judge: item 13 (a). See also Rule 35 (g) *supra*. It will be observed that the claimant is liable only to pay the costs "for keeping," not costs of seizure or any other costs. The claimant must multiply the amount of possession money for a day by the number of days to elapse before trial: *Cramer v. Matthews*, 7 Q.B.D. 430.

The bailiff has no option but is bound to sell the goods if the claimant fails to comply with the conditions laid down in the rule, and a purchaser of them acquires a valid title to them, although the claimant subsequently proves that the goods were his: *Goodlock v. Cousines*, (1897) 1 Q.B. 348 558.

It is not necessary for the interpleader summons to issue nor for the bailiff to request the claimant to comply with the conditions before proceeding to sell the goods: *Cramer v. Matthews*, 7 Q.B.D. 425; and the sale being the act of the law, no liability would be incurred therefor: *Reid v. Gowans*, 13 A.R. 501, and other cases cited *ante* p. 467.

No provision is made for the deduction of the bailiff's costs.

The proceeds of the sale must be paid into court to abide the final decision of the matter: Rule 37. Any money paid into court shall be retained by the clerk until the claim shall be adjudicated upon: Rule 33.

County Judge Having Jurisdiction.—Should the summons not be properly issuable from the court from which it was issued the judge would have no jurisdiction: see notes to sections 71 and 72; but see *Haldan v. Beatty*, 43 U.C.R. 614.

The Judge Shall Adjudicate on the Claim.—The language is imperative and the judge has no alternative but to adjudicate on the questions which are properly presented to him in the interpleader issue. The adjudication here mentioned is simply the judicial determination of some question or questions in dispute between the parties to the interpleader issue. See notes under title "Particulars of Claim," *ante* p. 463.

As to the right of a party to an interpleader issue to demand a jury and the issues to be tried in such a case, see section 161 and notes thereto.

Unless a new trial is moved for within fourteen days from the adjudication as prescribed by sub-section 3, the decision of the judge is final and conclusive as to the goods or the proceeds thereof: *R. v. Doty*, 13 U.C.R. 398; *Keane v. Stedman*, 10 C.P. 435; *Williams v. Richardson*, 36 L.T. 505; *Turner v. Bridgett*, 9 Q.B.D. 55; and the judge cannot reverse, change, or alter his decision if such application is made after the time has elapsed: *Re Foley v. Moran*, 11 P.R. 316; *Bland v. Rivers*, 19 O.R. 407.

The Costs of the Proceedings.—The judge could not adjudicate upon any question of costs, except costs of the proceedings mentioned in the statute: *Hansen v. Maddox*, 12 Q.B.D. 100.

It will be observed that the subject of costs is mentioned twice in this sub-section: 1st, in regard to the costs of the interpleader proceedings to test the right to the goods seized, and 2nd, in respect to the costs of the proceedings incident to the enquiry as to damages. As to the question of costs between the parties to the interpleader issue it may be said that costs should usually follow the result. It is a rule generally observed and subject to few exceptions, if any: *Seaward v. Williams*, 1 Dowl. 528; *Scales v. Sargeson*, 3 Dowl. 707; *Wills v. Hopkins*, 3 Dowl. 346; *Bank of Montreal v. Little*, 17 Gr. 685.

When each party succeeds as to part, the costs will be apportioned: *Lewis v. Holding*, 3 Scott. N.R. 191; *Staley v. Bedwell*, 10 A. & E. 145; *Clifton v. Davis*, 7 E. & B. 392; *Dempsey v. Caspar*, 1 P.R. 134; *Carter v. Stewart*, 7 P.R. 85; *Segsworth v. Meridan S. Plating Co.*, 3 O.R. 413.

Should either the execution creditor or the claimant, after the issue of the interpleader summons, wish to abandon all claim to the goods, it is not definitely established what the effect of doing so would be on the question of costs.

If an execution creditor had not given any instructions as to the seizure of the goods, and on being made aware of it had given notice abandoning all claim to them, it is submitted that he could not be held responsible for costs: *Wilkins v. Peatman*, 7 P.R. 84; *Canadian Bank of Commerce v. Tasker*, 8 P.R. 351; *Rooda v. Gun and Shot and Griffin's Wharves Co.*, 28 L.T. 635; *Vanstaden v. Vanstaden*, 10 P.R. 428.

The question of costs cannot be considered before the disposal of the issue: *Salter v. McLeod*, 10 U.C.L.J. 299.

Should there manifestly appear to be no *bona fide* claim to the goods by a claimant, he could not, it is submitted, obtain security for costs from the other party: *Doer v. Rand*, 10 P.R. 165; *De St. Martin v. Davis*, W.N., (1884) 86; *Anglo-American v. Rowlin*, 20 C.L.J. 371; *Tomlinson v. Land and Finance Corporation*, 14 Q.B.D. 539.

As security for costs can now be ordered in the Division Court: *Re Fletcher v. Noble*, 9 P.R. 255, notes *ante* p. 270, the writer sees no reason why such security cannot be ordered in an interpleader issue: *Lovell v. Wardroper*, 4 P.R. 265; *Swain v. Stoddart*, 12 P.R. 490.

Where the claimant fails the bailiff's costs are to be allowed to him out of the amount levied, unless otherwise ordered.

If the bailiff does not retain his costs out of the amount levied, he cannot, if the claimant has been ordered to pay the costs, sue the execution creditor for them: *Bloor v. Huston*, 15 C.B. 266.

The High Court would have no power to interfere with the discretion exercised by the judge of the Division Court on a question of costs: *Churchward v. Coleman*, L.R. 2 Q.B. 18.

Independently of the judge's order there would be no duty cast on either execution creditor or claimant to pay the costs of the interpleader proceedings: *Bloor v. Huston*, 15 C.B. p. 275.

Where a judgment had been given in an interpleader issue, and the Court of Appeal reversed it, it was held that the part relating to costs was reversed too: *Gage v. Collins*, L.R. 2 C.P. 381.

Damages, etc., Arising Out of the Execution of the Process.—This provision is taken from the English statute, 30 & 31 V. c. 12, s. 31 (see now *The County Court*, 1888, 51 & 52 V. c. 43, s. 157). The material words are exactly alike in both statutes, changes being made in our statute to suit the altered circumstances.

The judge has power, and it is his imperative duty, not only to adjudicate between the parties to the issue or either of them, but also as between either of them and the officer or bailiff in respect of any damage, or claim of or to damages arising or capable of arising out of the execution of the process by the officer or bailiff.

The words of the section are very comprehensive, and are intended to cover, and it is submitted do cover all and every claim for damages which any of the parties would have had against the other in any way arising, or that by possibility might arise out of the execution of the process.

It is submitted that a liberal interpretation should be given to the clause and that it would be applicable to the case of a seizure made under warrant of attachment issued by a county judge or justice of the peace under section 258 if damages ensue. Should any of the parties have any claim for damages, within the meaning of this provision, it should be asserted in the interpleader issue, and if the party having such claim should lie idly by and allow the judge to adjudicate upon the other questions only, he would be precluded from making the claim in another action: *Death v. Harrison*, L.R. 6 Ex. 15; *Fox v. Symington*, 13 A.R. 296. The section was enacted following the English statute after the decision of *Farrow v. Tobin*, 10 A.R. 69, which probably suggested the amendment.

But an action might still be maintained against the purchasers of the goods: *Hills v. Renny*, 5 Ex. D. 313; unless sold under Rule 36.

The English Act contains a provision for staying proceedings in any action between any of the parties, "in respect of such claims or of any damage arising out of the execution of such process." The language is somewhat wider than that of sub-section 1, but *quære*, whether it has any greater effect: *Smith v. Critchfield*, 14 Q.B.D. 873.

What damages may be given must of course depend on the circumstances of each particular case. But it is submitted that the object of allowing the bailiff to interplead is that he may be protected against the adverse claims of the execution creditor and the claimant, and so that they may fight out the question of the ownership of the goods between themselves.

The bailiff stands in this position. If he does not seize, the execution creditor may sue him and his sureties for misconduct. If he seizes, the claimant may sue him for trespass and conversion. It would, in fact, be no protection to the bailiff to mulct him in damages, if acting honestly in the execution of his duty he seized goods which in fact belonged to the claimant. The principles of interpleader and the principles of practice of the High Court may well be followed in a case of this kind.

In *Smith v. Critchfield*, 14 Q.B.D. 873, at page 878, *Bret, M.R.*, said:—"It is not of course in every case that the judge will protect the sheriff. He will be protected when he has only made an honest mistake in executing the powers of the court, and but for such mistake everything that has been done would have been justified by the writ."

Application for New Trial Within Fourteen Days.—See notes to sections 151 and 152, *ante* pp. 284 *et seq.*, as to application for new trial. At one time there was no power to grant a new trial in cases of interpleader in the Division Court: *R. v. Doty*, 13 U.C.R. 398; and unless a new trial is moved for within the proper time now, the judge's decision is irrevocable in such cases: *Re Foley v. Moran*, 11 P.R. 316; *Bland v. Rivers*, 19 O.R. 407.

Any one of the three parties may apply for a new trial: (1) The attaching or execution creditor; (2) The claimant; (3) The officer or bailiff.

Upon Such Terms as he may Think Reasonable.—The usual power to impose terms on granting a new trial is here conferred on the judge. This is a discretion which should not be exercised arbitrarily, but according to the principles of reason and justice, and with a due regard to the rules of law applicable to such cases: see notes to section 181.

As to the imposition of terms see notes to section 113, *ante* page 192.

Sub-Section 4.—Summons May Issue in the Names of the Creditors as Plaintiffs.—The application by the bailiff for an interpleader summons and the summons to be issued by the clerk in pursuance of it, must give the names of all the execution or attaching creditors as in the suits, and all must be duly served in order to bind them. Should a bailiff disregard this section he, as an officer, would be subject to the summary jurisdiction of the court, and would be made to bear the unnecessary expense, and the cases would be consolidated: *Merchants Bank v. Herson*, 10 P.R. 117.

The issue of the interpleader summons assumes the right of the execution creditor to seize the goods of the execution debtor by virtue of a judgment recovered or attachment issued against him, and subsequently the execution creditor is not bound to prove a judgment: *Holden v. Langley*, 11 C.P. 407; *Vindin v. Wallis*, 24 U.C.R. 9; *Doyle v. Lasher*, 16 C.P. 263; *McWhirter v. Learmouth*, 18 C.P. 136.

Quære, whether a subsequent execution creditor could contest the right of a prior execution creditor to the goods or their proceeds on the ground that his judgment was void as against creditors?

The judge has full power to try the question of damages, no matter to what amount such damages may be.

Appeal.—As to the right of appeal in interpleader cases, see section 154, *ante* p. 292, sub-section 2 and notes thereto. It is submitted that the doubt whether an appeal lies from the determination of the judge, on a question of damages and in such cases, by *Fox v. Symington*, 13 A.R. 296, at page 302, has been removed on the revision of the statutes by section 154, sub-section 2. The better opinion seems to be that an appeal will lie at the instance of a landlord who has been a party to the interpleader proceedings: *Wileoxon v. Searby*, 29 L.J. Ex. 154. Where neither the value of the goods claimed nor the proceeds thereof exceed \$100 and the damages awarded do not exceed \$60, an appeal does not lie, even by leave of the judge: *Collis v. Lewis*, 20 Q.B.D. 202; see also *White v. Milne*, W.N. (1897) 256. A claimant who has deposited less than \$100 as the appraised value of the goods cannot claim to appeal on the ground that the goods were really more than \$100, and that a less amount was deposited because it was sufficient to satisfy the execution creditor's judgment: *White v. Milne*, W.N. (1887) 256; 58 L.T. 225; but see *Studham v. Stanbridge*, (1895) 1 Q.B. 870. Where the value of the goods seized exceed \$100, there is an appeal though the claim of the execution creditor is for less than \$100: *Vallance v. Naish*, 2 H. & N. 712. See also notes *ante* pp. 298, 299.

Defence by Bailiff and Creditor—Sub-section 6.—Where a claim for damages is made against the bailiff and creditor or either of them, they, or either of them, may pay money into court in satisfaction of this claim in the same manner and with the same effect, and the parties shall have the same rights and remedies of defence and counterclaim as they would have in an action in which the claimant was plaintiff and the bailiff and creditor defendants: Rule 35 (c).

The right given to the bailiff to counterclaim is practically allowing him to sue in his own court, notwithstanding section 92. As to counterclaim see notes to section 75. The words "of defence and counterclaim" in Rule 35(c), are unnecessary as this is covered by the statute.

If any claim for damages be not adjudicated upon in the interpleader proceedings the claimant is absolutely barred from recovering from the creditor or bailiff: *Fox v. Symington*, 13 A.R. 296 and cases cited, *ante* p. 470.

Payment into Court.—See section 131 and notes thereto. The payment into court must be made six clear days before the return day. See also Rules 171, 244 and 245.

Provisions
in relation
to rents due
to land-
lords.

8 Anne, c. 14.

278.—(1) So much of the Act passed in the 8th year of the reign of Queen Anne, intituled *An Act for the better security of Rents and to prevent Frauds Committed by Tenants*, as relates to the liability of goods taken by virtue of any execution, shall not be deemed to apply to goods taken in execution under the process of any Division Court, but the landlord of a tenement in which any such goods are so taken may, by writing under his hand or under the hand of his agent, stating the terms of holding and the rent payable for the same, and delivered to the Bailiff making the levy, claim any rent in arrear then due to him, not exceeding the rent of four weeks when the tenement has been let by the week, and not exceeding the rent accruing due in two terms of payment where the tenement has been let for any other term less than a year, and not exceeding in any case the rent accruing due in one year. R.S.O. 1887, c. 51, s. 270.

(2) Notice of the said claim may be given at any time before the return of the execution, notwithstanding that the goods may in the meantime have been removed from the premises upon which they were seized, and when the goods of a tenant are sold within ten days after the seizure, the money realized shall remain in court until the expiration of the said term of ten days to answer the claim of the landlord, and in cases where the money has been paid into court the notice may be directed to the Clerk with like effect as if given to the Bailiff before the sale of the goods so seized. 60 V. c. 14, s. 10.

Goods Taken By Virtue of Any Execution.—The statute of Anne prevented the sheriff from removing "goods seized" under execution, without paying the rent of the premises in arrear, "not exceeding the rent for one year."

The English County Courts Act, 1888, (51 and 52 V. c. 43, s. 160) contains provisions very similar to those made by sub-section 1 and sections 279-282.

It is submitted that goods seized under an attachment against an absconding debtor are not, under this section, subject to the landlord's claim for rent.

The section would apply to an execution for costs of defence: *Henchett v. Kimpson*, 2 Wils. 140.

Landlord's Claim for Rent—The Landlord of a Tenement.—"Tenement," though in its vulgar acception is only applied to houses and other buildings, yet, in its original, proper and legal term signifies everything that may be holden, provided it be of a permanent nature; whether it be of a substantial and sensible, or of an unsubstantial ideal kind: 2 Bl. Com. 16; Stroud. 974.

The notice of claim by a landlord cannot be given unless there is an *existing tenancy* at a fixed rent; and if the tenancy should be determined or has expired the notice would not be effective: *Cook v. Cook*, Andrew, 219; *Risley v. Ryle*, 10 M. & W. 101; and *Risley v. Ryle*, 11 M. & W. 16. A mere agreement for a lease under which no rent has been paid or possession taken would not be sufficient: *Ib.*; see *Hand v. Hall*, 2 Ex. D. 355. Nor does the statute apply if the lease has been legally determined by a notice to quit or by entry or ejectment for a forfeiture: *Hodgson v. Gascoigne*, 5 B. & Ald. 88. It applies to forehand rents payable in advance: *Harrison v. Barry*, 7 Price 690; *Duck v. Braddyll*, McClell. 217; and even when reserved in a mortgage by way of further security for interest: *Yates v. Rutledge*, 5 H. & N. 249; *Trust & Loan Co. v. Lawrason*, 10 S.C.R. 679; *Ontario Loan & Debenture Co. v. Hobbs*, 16 A.R. 255; 18 S.C.R. 483. The statute would apply to the case of a lessee or undertenant of apartments: *Thurgood v. Richardson*, 7 Bing. 428. The landlord can only claim rent which was *due* at the time of the seizure, and not what accrued afterwards: *Hoskin v. Knight*, 1 M. & S. 245; *Reynolds v. Barford*, 7 M. & G. 449; *Tomlinson v. Jarvis*, 11 U.C.R. 60; *Vance v. Ruttan*, 12 U.C.R. 632. And this is also the law as to growing crops: *Congreeve v. Evetts*, 10 Ex. 298; *Wharton v. Naylor*, 12 Q.B. 673. It is to be observed that the words of the section are "any rent in arrear *then due*." The Statute of Anne was construed liberally, and in favor of the landlord: *Henchett v. Kimpson*, 2 Wils. 141. We see no reason for construing this section in any different spirit. This provision would not apply to a case where the landlord was himself the execution creditor: *Taylor v. Lanyon*, 6 Bing. 536. Where the execution creditor pays the landlord the rent after seizure, the bailiff holds the proceeds of sale for the repayment to the creditor of the rent paid *and* the amount of the execution: *Lockhart v. Gray*, 2 C.L.J. 163. Under the Statute of Anne it is not necessary to give notice "in writing" to the sheriff: *Brown v. Ruttan*, 7 U.C.R. 97; *Sharpe v. Fortune*, 9 C.P. 523; *Tomlinson v. Jarvis*, 11 U.C.R. 60; *City of Kingston v. Shaw*, 6 U.C.L.J. 280; *Corp. Kingston v. Shaw*, 20 U.C.R. 223; but under this statute *written* notice is rendered necessary: *Re McGregor v. Norton*, 13 P.R. 223. The landlord could not distrain the goods for rent after seizure by the bailiff: *Sharpe v. Fortune*, *supra*; *Craig v. Craig*, 13 C.L.J. 326. The fact of a landlord having joined in a bond that the goods distrained should be forthcoming for sale upon a *fi. fa.* was held not to prejudice his claim for rent: *Brown v. Ruttan*, 7 U.C.R. 97; nor would the landlord's having distrained and afterwards abandoned the distress, nor even his having bid at the sale of

the goods, prejudice such claim for rent: *Ib.* In *Vance v. Ruttan*, 12 U.C.R. 632, the facts were that premises had been let for a year at a rental of £75, to be paid on the first of May, and it was agreed that if the tenant should leave before the first of May, the rent was to become payable immediately. The tenant left on the Saturday before the first of May, and on Monday the goods were seized under execution; it was held that the landlord was entitled to his rent.

Abandonment of Seizure.—Should a bailiff, acting in good faith for all concerned, agree to pay for having grain threshed for the purpose of its better sale, the expenses of such threshing would be allowed him: *Galbraith v. Fortune*, 10 C.P. 109. Should a bailiff merely make an inventory of goods seized, leaving no one in possession of them, they would not be in the custody of the law so as to prevent the landlord claiming for the rent due at the time the execution was subsequently attempted to be enforced: *Hart v. Reynolds*, 13 C.P. 501; but being absent for a mere temporary purpose is not an abandonment: *Gordon v. Rumble*, 19 A.R. 440; *Coffin v. Dyke*, 48 J.P. 757; nor if they were left in the hands of a person who undertook to be responsible: *Lossing v. Jennings*, 9 U.C.R. 406; *Duffus v. Creighton*, 14 S.C.R. 740; and see cases cited in notes to section 218, *ante* pp. 381 and 383, title "Abandonment."

Where the bailiff placed a man in charge of goods seized under execution and the man left voluntarily and without any intention of returning, although what he did was without the sanction of the bailiff and in violation of duty, it was held that the goods were not in *custodia legis* and the landlord could distrain: *Cross v. Davidson*, 17 C.L.T. 189; see also *Bagshaws (Ltd.) v. Deacon*, (1898) 2 Q.B. 173, cited *ante* p. 383.

Seizure Must Be Made.—Where at the time an execution was placed in the sheriff's hands there was a claim for unpaid rent, it was held that the sheriff could not delay the seizure until the execution creditor first paid off the rent. His proper course was to seize, but he was not compelled to sell until the rent was paid; and if the execution creditor would not pay it, he might withdraw from possession. In this case the sheriff abstained from seizure on receiving notice of the rent being due, of which the execution creditor was aware when he issued the *f. fa.*; and, before he seized, certain crops were removed, sufficient to pay the plaintiff's claim; it was held that the sheriff was liable: *Loeke v. McConkey*, 26 C.P. 475. The same principle would apply in the case of a bailiff. Should a bailiff realize the amount of an execution, he could not justify the retention of the money on the ground that the landlord had made a claim to the whole of it for rent, which he had not been able to prove the truth of: *Hall v. Badden*, 7 L.T. 721.

When the bailiff has received notice of rent due he should endeavor to secure legal evidence on that point, and, if possible, inspect the lease, or make inquiry about the terms of holding: *Augustien v. Challis*, 1 Ex. 279. He should also forthwith give a copy of the notice to the execution creditor or his solicitor, so that, if so advised, he might question the landlord's claim under section 277, or otherwise. Although goods seized by a bailiff could not be distrained in his custody, still such goods must be removed within a reasonable time after the sale in order to protect the rights of the purchaser against a distress for rent: *Hughes v. Towers*, 16 C.P. 287.

Notice of Landlord's Claim.—Sub-section 2 effects an alteration in the law as it existed before 1897. It is intended to apply to cases where all the exigible goods of a tenant are seized and either removed or sold before the landlord has put in his claim. If all the goods of a tenant are necessary to satisfy an execution, and the landlord is by their removal or sale deprived of his remedy, there is no injustice to the execution creditor

in requiring him to satisfy the landlord's claim to the extent of the proceeds of the goods. Where, however, all the goods are not removed or sold under the execution, but some remain on the premises, there is nothing to prevent the landlord distraining upon them. If he allows them to be removed, and thus loses his right of distress upon them, it seems unfair to make the execution creditor pay the rent. If they are not removed, but still remain on the premises after the sale by the bailiff, but before he has returned the execution, it does not appear at all clear that the bailiff could, under section 279, then levy for the rent. The distress spoken of in that section appears to be one made as incident to and as part of a levy under a warrant of execution which has not been realized upon, which levy has become necessary because the goods which might otherwise be distrained are in the custody of the law. If the execution is returned within the ten days from the seizure, the right of the bailiff to then levy for the rent would appear to be entirely gone.

For form of notice see Form 166.

Time for Giving Notice.—The notice must be given (1) before the return of the execution or (2) within ten days from the seizure.

Money to be Retained.—Where the goods are sold within ten days after the seizure, and the proceeds paid by the bailiff into Court pursuant to Rule 186, the Clerk must retain it until ten days from the seizure have expired. Should the seizure be made on the tenth, the money could not be paid over till the twenty-first. Section 239 prescribes that the sale shall not take place until eight days after the seizure. But the debtor may probably waive that provision. In all cases where a bailiff realizes by sale of goods seized, within ten days of the seizure, he should in order to protect the rights of the landlord, notify the clerk, upon paying over the proceeds, of the date of the seizure.

Stating the Terms of Holding.—The terms should be particularly set out, so that the bailiff may receive such reasonable information as will enable him to decide upon what course to pursue: *Tomlinson v. Jarvis*, 11 U.C.R. 60. If the bailiff should disregard the notice, he would be liable: *Galbraith v. Fortune*, 9 C.P. 211; *Robertson v. Fortune*, 9 C.P. 427. The "writing" is by the statute required to contain particulars; and in that respect this section differs from the Statute of Anne: *Sharpe v. Fortune*, 9 C.P. 523. For form of landlord's claim for rent, see Form 166. It must be *in writing*, under the hand of the landlord or his agent. Care should be taken in drawing up the notice, and the bailiff should have nothing to do with it; otherwise, in the event of dispute, he might have no right to an interpleader: *Cox v. Balne*, 2 D. & L. 718. The notice should be given before the sale, so that the bailiff might sell for the rent as well, under the 279th section: see *Arnett v. Garnett*, 3 B. & Ald. 440. As to the claim of the landlord generally, see 6 U.C.L.J. 228, 261; 7 U.C.L.J. 13, 14.

Landlord's Lien for Rent.—The landlord's lien for rent is limited by the statute, and although the lease may contain an acceleration clause wider in its terms than the statutory provision, the landlord would be entitled to no more than the statute gives him: see *Langley v. Meir*, 25 A.R. 372; *Lazier v. Henderson*, 29 O.R. 673; *Tew v. Toronto S. & L. Co.*, 30 O.R. 76.

Under this Act the lien only attaches when goods are "taken by virtue of any execution," and the lien for rent of course applies only to the premises upon which the goods are so taken.

279. In case of any such claim being so made, the Bailiff making the levy shall distrain as well for the amount of the rent claimed, and the costs of the additional distress, as for

How the
bailiff is to
proceed.

the amount of money and costs for which the warrant of execution has issued, and shall not sell the same, or any part thereof, until after the expiration of at least eight days next following after the distress made. R.S.O. 1887, c. 51, s. 271.

Shall Distrain.—The claim for rent under this Act appears to be enforceable as if it was an *additional amount* payable on the execution, and for the making of such additional sum a separate allowance is made. The formalities necessary in the case of distress for rent by a landlord do not appear to be required of a bailiff under this and the preceding section.

Goods exempt from seizure under execution cannot be seized for rent, but in the case of a monthly tenancy such exemption only applies to two months' arrears: R.S.O. c. 170, s. 30. But it was held that, notwithstanding this provision, such goods could not be distrained though more than two months rent was in arrear: *Harris v. Can. Per. L. & S. Co.*, 17 C.L.T. 424; but if the landlord has given the notice required by subsection 4 of section 32 of R.S.O. c. 170, and the tenant does not offer to give up possession, there would seem to be no reason why the exemptions could not be taken.

Goods belonging to persons who occupied the premises by permission of a house agent acting for the tenant, but who had no authority to grant such permission, were held not liable to seizure for arrears of rent due by the tenant: *Farwell v. Jameson*, 26 S.C.R. 588.

Goods under distress for rent are in *custodia legis*, and cannot be seized by a tax collector for arrears of taxes: *Jones v. Burnstein*, (1899) 1 Q.B. 470.

The bailiff can be sued by the landlord for the money which he makes for rent, as money had and received: *Lockhart v. Gray*, 2 C.L.J. 163; and it would be garnishable in the bailiff's hands, in a suit against the landlord: *Ib.*

The bailiff cannot distrain for the rent upon the goods of a stranger, any more than he can seize such property on the execution: *Beard v. Knight*, 8 E. & B. 865; *Foulger v. Taylor*, 5 H. & N. 202; see R.S.O. c. 170, s. 31. See also *Hughes v. Smallwood*, 25 Q.B.D. 306; *Re Broster*, *Ex parte Pruddah*, (1897) 2 Q.B. 429.

Fees of
bailiff in
such cases.
Rev. Stat.
c. 75.

280. For every additional distress for rent in arrear, the Bailiff of the Court shall be entitled to have as the costs of the distress, instead of the fees allowed by this Act, the fees allowed by *The Act respecting Costs of Distress or Seizure of Chattels*. R.S.O. 1887, c. 51, s. 272.

Fees Allowed.—The additional distress here referred to means that which is necessary for the bailiff to make in order to realize the amount of the rent over and above the moneys to be made on the execution. The fees are:—

Levying distress under \$80	\$1.00
Man keeping possession, per diem	75
Appraisement whether by one appraiser or more, two cents in the dollar on the value of the goods.	
If any printed advertisements, not to exceed in all.....	1.00
Catalogues, sale and commission and delivery of goods, five cents in the dollar on the net produce of the sale.	

R.S.O. c. 75, p. 896.

There is no provision made under this Act for additional costs when the amount of the rent exceeds \$80, as there is under the Act respecting distress for rent: R.S.O. c. 75, s. 2.

The bailiff is "entitled" to the fees allowed for distress. If the amount of the rent be large, it is possible that he might waive that right and claim the same fees as would be allowed him on an execution for like amount. Under the English County Court Act, 51 & 52 Vic. c. 43, s. 160, which provides that the poundage, appraisalment, and sale are to be "the same as would have been payable if the distress had been an execution of the county court, and no other fees shall be demanded or taken," the bailiff is entitled to fees and poundage in respect of both execution and the landlord's claim for rent: *Re Broster, Ex parte Pruddah*, (1897) 2 Q.B. 429.

281. If a replevin is made of the goods distrained, so much of the goods taken under the warrant of execution shall be sold as will satisfy the money and costs for which the warrant issued, and the costs of the sale, and the surplus of the sale and the goods so distrained shall be returned as in other cases of distress for rent and replevin thereof. R.S.O. 1887, c. 51, s. 273.

If replevin made.

Goods Distrained.—At common law a tenant had a right to replevy as for an illegal distress his goods distrained for rent, and this section preserves him that right: see notes to section 72, sub-section 5, in which the law relating to replevin is discussed. See also Rule 65.

The replevy can only be made so as to supersede the distress, and the bailiff would, notwithstanding the replevin, be entitled to retain the goods to the extent necessary to satisfy the execution. But under section 282 the proceeds of such goods could not be paid over until the landlord was first satisfied: see R.S.O. c. 66, ss. 2, 3, and 8, *ante* p. 91.

282. No execution creditor under this Act shall have his debt satisfied out of the proceeds of the execution and distress, or of the execution only, where the tenant replevies, until the landlord who conforms to the provisions of this Act has been paid the rent in arrear for the periods hereinbefore mentioned. R.S.O. 1887, c. 51, s. 274.

When landlord's claim to rent is to be first paid.

OFFENCES AND PENALTIES.

Contempt of Court.

283. If a person wilfully insults the Judge or acting Judge or any officer of a Division Court during his sitting or attendance in Court, or interrupts the proceeding of the Court, any Bailiff or officer of the Court may, by order of such Judge, take the offender into custody, and such Judge may impose upon the offender a fine not exceeding \$20, and in default of immediate payment thereof, the said Judge may by warrant under his hand and seal commit the offender to the

Contempt of court.

Common Gaol of the County for a period not exceeding one month, unless the fine and costs, with the expense attending the commitment, are sooner paid. R.S.O. 1887, c. 51, s. 275

Contempt of Court.—Every Court of Record has an inherent power to punish for contempt: *Ex parte Pater*, 5 B. & S. 299; *Ex parte Lees* and the Judge of the County of Carleton, 24 C.P. 214. The statute here confers a power on the judge of a Division Court which would belong to a Court of Record as one of its inherent attributes. In *Carus Wilson's* case, 7 Q.B., p. 1015, Lord Denman, C.J., said: "But here it appears that a contempt was supposed to have been committed. That is, a case in which it becomes the unfortunate duty of a court to act as both party and judge, and to decide whether it has been treated with contempt. We cannot decide upon the face of this return (to a writ of *Habeas Corpus*) that they have come to a wrong conclusion. A court may be insulted by the most innocent words, uttered in a peculiar manner and tone. The words here might or might not be contemptuous, according to the manner in which they were spoken, and that is what we must look to. If the words might be contemptuously spoken, that was an ample occasion for the decision of the Royal Court (of Jersey) with which no other court can meddle. Every court in such a case has to form its own judgment." At page 1017 of the same report, Williams, J., said: "It is quite obvious that contempt may be shown either by language or manner. We can imagine language which might be perfectly proper if uttered in a temperate manner, but might be grossly improper if uttered in a different manner. No one not present can be a competent judge of this." Speaking of the prisoner's conduct in that case, Wightman, J., said, at page 1018: "It seems to me that it might be contemptuous as being highly disrespectful, although the words themselves are not necessarily so." In *Re Judge of the Division Court of Toronto*, 23 U.C.R. 376, Draper, C.J., is reported at page 378, as saying: "The power of punishing contempts by fine is given by statute to the judge of a Division Court, and such a power, though like any other power by which a man becomes, as it were, a judge in his own cause, and can exercise his authority without any direct control, and perhaps without any responsibility, is dangerous as open to abuse, is nevertheless found indispensable. Contempts are perhaps the most undefinable of offences, for they may consist in looks and demeanour, as well as in positive acts and expressions; and though our statute uses the words 'wilfully insults,' it does not appear to me to change the application or extent of the power given." Again, at page 379, the same learned judge said: "It is more easy to feel than describe how an advocate may exhaust the patience and wear the temper of any judge by continually keeping on the verge of what he well knows to be forbidden ground, and by occasionally overstepping the line after oft repeated check and caution from the bench, in the ardor, real or affected, of his zeal for his client. When such conduct is long persevered in, it produces almost inevitably in the judge's mind a sense that it requires scrupulous watching in order that the advocate may, if possible, be restrained within proper limits; or, if he will exceed them, may, if necessary, be promptly punished; and thus it may well happen that the judge may pronounce the advocate to be in contempt, where a by-stander, who knew nothing beyond the immediate occurrence, might deem the decision harsh or even unwarrantable." In *Ex parte Pater*, 5 B. & S., at page 312, Blackburn, J., said: "I agree that when we are considering a question of contempt, we ought to see whether the inferior court had reasonable grounds for adjudging that a contempt had been committed; but we must bear in mind that the court is the judge whether it has been treated with contempt, as Lord Denman said in the case of *Carus Wilson*, 7 Q.B. 984-1015, for, looking to the nature of

the contempt, it may consist in the peculiar manner and tone with which words are spoken." The power conferred on the judge by this section is confined to contempts committed *in court*, and he would have no power under it to proceed against a person for a contempt committed out of court: *R. v. Lefroy*, L.R. 8 Q.B. 134; see also *R. v. Brompton C.C. Judge*, (1893) 2 Q.B. 195; *Re Eliot, Ex parte Bushill*, 41 Sol. Jour. 625; 4 U.C.L.J. 243, and 4 U.C.L.J. 259; 11 C.L.J. 156, on the general question of contempt of court; but the power given by this section would not restrict the powers of the judge under section 75: *R. v. Surrey (Judge)*, 13 Q.B.D. 963. Commitments for contempt by prohibition of scandalous matter affecting the court are now obsolete: *McLeod v. St. Aubyn*, (1899) A.C. 549; see *Re O'Brien*, 16 S.C.R. 197. Should the judge act under this section, the penalty can be imposed and enforced instantly: *Watt v. Ligertwood*, L.R. 2 Scotch App. 391; see also *Baird v. Story*, 23 U.C.R. 624. In *Re Pollard*, L.R. 2 P.C. 106, the Judicial Committee held that where the court did not impose the fine on the committing of the contempt, but delayed it, and then on a subsequent day imposed the penalty, without an opportunity of the party's answering the charge, such proceeding was illegal. In *Re Sealife*, 5 B.C.R. 153, it was held that contempt being a criminal offence, nothing will be inferred, and the charge must be proved with particularity.

An insult to the clerk or any officer during the sitting of the court, and, though not actually in the presence of the judge, within the precincts of the court, might be punishable under this section: see *Re Johnson*, 20 Q.B.D. 68.

A small room communicating with a larger one is not open court: *Kenyon v. Eastwood*, 57 L.J.Q.B. 454.

Wilfully Insults.—A "wilful insult," is one that arises from the spontaneous action of the will. It amounts to nothing more than this "that he knows what he is doing and intends to do what he is doing and is a free agent." *Re Young and Re Harston*, 31 Ch. D. 174; *Wilson v. Manes*, 26 A.R. 398.

To observe to a judge in the course of and in reference to his judgment, that "That is a most unjust remark" is an insult to the court in whatever manner it is expressed, and, if not withdrawn, it amounts to such a "wilful insult" as is contemplated by the section: *R. v. Jordan*, 36 W.R. 589, 797.

Interrupts the Proceedings.—Anything unseemly said or done by any person which would interfere with the conduct of the business of the court, or that would be highly indecorous, might be the subject of a penalty under this clause.

Take the Offender into Custody.—Power is here given to the judge to order the person to be taken into custody, so that he may be brought before him to answer for his misconduct. The limit of the fine is twenty dollars, and no greater fine could be imposed.

Immediate Payment.—The word "immediate" here does not mean "instantly." A reasonable time would be allowed the delinquent for payment of the money: *Toms v. Wilson*, 4 B. & S. 455; *Forsdike v. Stone*, L.R. 3 C.P. 607; *Massey v. Sladen*, L.R. 4 Ex. 13; *Re Silence*, 7 Ch. D. 238. As remarked by Cockburn, C.J., at page 453 of 4 B. & S., "he might require time to get it from his desk, or to go across the street, or to his banker's for it."

Under His Hand and Seal.—The plain words of the section require this commitment to be under the hand and seal of the judge: see also 3 L.C.G. 14. It differs in that respect from a commitment under section 247: *Ex parte Heymann*; *Re Heymann*, L.R. 7 Ch. 488; *Ex parte Waters*; *Re Waters*, L.R. 18 Eq. 701.

It will be necessary for the commitment to show whether the defendant is fined for insulting the judge or an officer, or for interrupting the proceedings. The nature of the insult need not be stated: *Levy v. Moylan*, 10 C.B. 189.

Power is given to the Division Court to impose fines under certain circumstances, and as it is an extraordinary power, its exercise must be carefully guarded: *Re Clements*, 46 L.J. Ch. 375.

As remarked in *Day v. Carr*, 7 Ex. 887, by Martin, B., a power to imprison without the intervention of a jury, ought not to be exercised, except upon strong grounds.

In courts of record a contempt is usually punished by imprisonment.

For the contempts enumerated in this section, a Division Court Judge has no power to imprison except as a means of enforcing payment of the fine.

A direct order for imprisonment would be invalid.

For forms of order of committal warrant thereon see Forms 93 and 163.

For a refusal to comply with an order of the court made in the exercise of its jurisdiction, the judge would have power, under section 75, to make an order for committal: *Martin v. Bannister*, 4 Q.B.D. 491; *Richards v. Cullerne*, 7 Q.B.D. 623.

Mere compliance with the order would not entitle the person committed to be released. A formal application for release would be necessary: *Re Davies*, 21 Q.B.D. 236; See *R. v. Stafford* C.C. Judge, 57 L.J. Q.B. 483.

Habeas Corpus.—An appellate court will not review the order of committal except where there is no reasonable evidence of the contempt and the liberty of the subject requires protection: *R. v. Jordan*, 36 W.R. 589, 797.

Resisting Officers.

Interfering
with bailiff.

284. If any officer or Bailiff (or his deputy or assistant) be assaulted while in the execution of his duty, or if any rescue be made or attempted to be made of any property seized under process of the Court, the person so offending shall be liable to a fine not exceeding \$20, to be recovered by order of the Court, or before a Justice of the Peace of the County or City, and to be imprisoned for any term not exceeding three months, and the Bailiff of the Court, or any Peace Officer, may in any such case take the offender into custody (with or without warrant) and bring him before such Court or Justice accordingly. R.S.O. 1887, c. 51, s. 276.

Resisting Officers.—See English County Courts Act, 1888, s. 48. A bailiff leaving goods and going to a public house for refreshments a mile distant would be entitled to re-enter on his return and any assault on him to prevent such re-entry would make the offender liable under this section: *Coffin v. Dyke*, 48 J.P. 757. Where the bailiff seized goods under a writ of replevin but left them in the possession of the defendant, taking an agreement from the latter to deliver up the goods when called upon, the bailiff was held to be acting under the agreement in a subsequent attempt to get the goods, in which he was assisted by a third person, and not in the execution of process against the goods under this section: *R. v. Carley*, 18 C.L.T. 26. See notes to section 218, title "Abandonment of Execution."

This section, as originally framed, made provision for criminal procedure, but in the revision of the statutes its language has been changed so as to bring it within the authority of the Legislature of Ontario.

Section 306 of the Criminal Code, 1892, is as follows:

"Everyone commits theft and steals the thing taken or carried away, who whether pretending to be the owner or not, secretly or openly, and whether with or without force or violence takes or carries away without lawful authority any property under lawful seizure and detention."

Section 144 also makes it an offence to disturb anyone in the lawful execution of any process or in making any lawful distress or seizure: see *Coffin v. Dyke*, 48 J.P. 757.

It will be observed that the section extends to an assault upon or rescue from a deputy or assistant bailiff. Probably the bailiff or deputy bailiff could alone make the original arrest or seizure, or at any rate his presence thereat would be necessary: *The Palomares*, 52 L.T. 57. See *R. v. Briggs*, 47 J.P. 615. Both fine and imprisonment may be awarded.

The fine would be enforceable by execution issued from the court: see section 290.

If an assistant bailiff wrongfully arrested a person, as for an offence under this section, the bailiff would be responsible: *Gordon v. Rumble*, 19 A.R. 440.

If there should be any question as to the liability of the party complained against, or if there should not be any necessity for his immediate arrest, a summons might be issued by the judge or justice.

For form of summons see Form 270.

If the bailiff proceeded under this section he is not thereby prevented from suing and recovering for the assault upon him: *Box v. Green*, 9 Ex. 503.

No appeal lies from the order of the court imposing a fine under this section: *Lewis v. Owens*, (1894) 1 Q.B. 102.

Misconduct of Clerks, Bailiffs, etc.

285. If a Bailiff or officer, acting under colour or pretence of process of the Court, is guilty of extortion or misconduct, or does not duly pay or account for all money levied or received by him by virtue of his office, the Judge, at a sitting of the Court, if a party aggrieved thinks fit to complain to him in writing, may enquire into the matter in a summary way, and for that purpose he may summon and enforce the attendance of all necessary parties and witnesses, and may make such order thereupon for the repayment of any money extorted, or for the due payment of any money so levied or received, and for the payment of any such damages and costs to the parties aggrieved, as he thinks just; and in default of payment of the money so ordered to be paid by the Bailiff or officer within the time in the order specified for the payment thereof, the Judge may, by warrant under his hand and seal, cause such sum to be levied by distress and sale of the goods

Misconduct
of bailiffs
and officers.

of the offender, together with the reasonable charges of the distress and sale, and in default of such distress (or summarily in the first instance) may commit the offender to the Common Gaol of the County for a period not exceeding three months. R.S.O. 1887, c. 51, s. 277.

Acting Under Color or Pretence of Process.—See English County Courts Act, 1888, s. 50. This would cover a case where a bailiff had not any process of the court, but *assumed* to act as if he had: see 7 U.C.L.J. 229, 230, and 260.

Extortion.—The offence of extortion consists in a public officer "taking under color of office from any person any money or valuable thing which is not due from him at the time when it is taken." "If the illegal act consists in inflicting upon any person any bodily harm, imprisonment, or other injury, not being extortion, the offence is called "oppression:" Stephens, Cr. 83. See *R. v. Tisdale*, 20 U.C.R. 272; *Parsons v. Crabbe*, 31 C.P. 151.

For an unintentional overcharge no penalty should be inflicted: *Shoppee v. Nathan & Co.*, (1892) 1 Q.B. 245.

The wrong must be done with the *mens rea* or intention of committing the offence: *Lee v. Dangar*, (1892) 1 Q.B. 231; (1892) 2 Q.B. 337.

Misconduct.—The term "misconduct" is very vague. It is submitted that for the penal purposes of this section no greater meaning should be given to it than would be given to the same term in the covenant of the sureties: see notes to section 35.

In *Clarke v. Moore*, 94 L.T. Jour. 390, it was held that seizing exempted goods was misconduct, entitling the debtor to recover damages from the bailiff under this section, but this decision was reversed in *Moore v. Brompton C.C. Bailiff*, 62 L.J.Q.B. 498; 69 L.T. 140; and it was held that the seizure of such goods by the bailiff was not "misconduct," although he acted recklessly and committed a serious error of judgment.

Wilful misconduct is a criminal offence: see section 143 Criminal Code, 1892.

Duly Pay.—Great delay in payment would be a proper ground for punishing the officer.

A bailiff should not mix moneys levied by him with his own money: *Milltown v. Boardman*, 10 C.L.T. 250.

Complain to Him in Writing.—The complaint must be in writing (*Re McGregor v. Norton*, 13 P.R. 223) *by the party aggrieved*, and not by a stranger, and must be inquired into at some court sittings.

The bailiff and his witnesses, if any, must have an opportunity to be present: 4 U.C.L.J. 132; *Osgood v. Nelson*, L.R. 5 H.L. 636; note to section 44, *ante* p. 35.

May Commit the Offender.—The judge has power only to order repayment of moneys extorted or withheld, or actual damage sustained by the party aggrieved.

He has no power to fine. The warrant of distress or commitment to gaol must be under the hand and seal of the judge. The judge need not go through the formality of distress, but may order committal as the only alternative of payment.

This being a *quasi* criminal proceeding, questions of doubt are to be construed favorably to the accused: *North Ontario Election*, H.E.C. 342; see *Re Scaife*, 5 B.C.R. 150.

For form of order see Form 93; and for warrant of commitment see Form 163.

286. If a Clerk, Bailiff or other officer exacts or takes any fee or reward other than the fees appointed and allowed by law for or on account of anything done by virtue of his office or on any account relative to the execution of this Act, he shall, upon proof thereof before the Court, be forever incapable of being employed in a Division Court in any office of profit or emolument, and shall also be liable in damages to the party aggrieved. R.S.O. 1887, c. 51, s. 278. Extortion.

Extortion.—See notes to section 285.

The clause is a penal one, and must be strictly construed: 4 U.C.L.J. 132; and the officer should have full opportunity of defending himself: notes to sections 44 and 285.

Extortion is punishable at common law by indictment, but indictments can only be maintained against the person actually guilty of the offence. and the bailiff is not liable to an indictment for the offence of his assistant: Woodgate v. Knatchbull, 2 T.R. 148; 1 R.R. 449; Saunderson v. Baker, 3 Wils. 309.

Negligence of Bailiffs.

287. In case a Bailiff employed to levy an execution against goods and chattels, by neglect, connivance or omission, loses the opportunity of so doing, then upon complaint of the party thereby aggrieved, and upon proof of the fact alleged to the satisfaction of the Court, the Judge shall order the Bailiff to pay such damages as it appears the plaintiff has sustained, not exceeding the sum for which the execution issued, and the Bailiff shall be liable therefor; and upon demand being made therefor and on his refusal to satisfy the same, payment shall be enforced by such means as are provided for enforcing judgments recovered in the Court. R.S.O. 1887, c. 51, s. 279. Bailiff neglecting duty in relation to execution.

Negligence of Bailiffs.—A summary power is here given to the judge to be exercised over the bailiff if he should neglect his duty in regard to an execution placed in his hands. Should damages be awarded and paid by the bailiff under this section, it is submitted that he could not be rendered civilly responsible otherwise. A summons must be issued and served on the bailiff: Mayer v. Burgess, 4 E. & B. 655.

Wilfully making a false return is a criminal offence: Criminal Code, 1892, section 143.

A bailiff acting under a transcript could not be proceeded against in the home court. The judge has power merely against the bailiffs of his own courts: R. v. Judge of County Court of Shropshire, 20 Q.B.D. 242.

Upon Demand.—This would be a necessary preliminary to execution: Davidson and the Chairman of Q.S. Waterloo, 24 U.C.R. 66; Trustees of the School Sec. No. 3 of the Township of Caledon v. Corp. of Tp. of Caledon, 12 C.P. 301; Bamford v. Clewes, L.R. 3 Q.B. 729; see also 10 U.C.L.J. 236.

Such Means as are Employed for Enforcing Judgments.—This is by execution, as pointed out by section 218, and in default of the money being made in that way, by the same means otherwise as could be resorted to against an ordinary debtor.

The execution against the bailiff might be issued to a person other than himself; for it would be absurd to issue a warrant to the bailiff to levy on himself.

This can be done under the inherent power of all courts to enforce their judgments, and by adopting the principles of practice of the High Court when a sheriff and coroner are interested, viz.: by the appointment of elisors: *Bellamy v. Hoyle*, L.R. 10 Ex. 220; see *Hawkins P.C.* b. 2, c. 22, s. 2; *Andrews v. Sharp*, 2 W. Bl. 911; *R. v. Peckham*, 2 W. Bl. 1218.

Right of
action
against
bailiff and
sureties for
neglect in
returning
execution
or making
false
return.

288. If a Bailiff neglect to return an execution within three days after the return day thereof, or makes a false return thereto, the party who sued out the writ may maintain an action in any Court having competent jurisdiction against the Bailiff and his sureties on the covenant entered into by them, and shall recover therein the amount for which the execution issued, with interest thereon from the date of the judgment, or such less sum as in the opinion of the Judge or jury the plaintiff under the circumstances is justly entitled to recover. R.S.O. 1887, c. 51, s. 280.

Within Three Days After the Return Day.—In this case the time would be reckoned thus; if the last of the 30 days during which an execution was in force should, for instance, be the 30th of September, the return to it should be made not later than the 3rd of the next month. Should the bailiff's sureties be changed between the time he received the execution and when he made default in returning it, the sureties when default made would be those liable: *Dacey on Parties to Action*, 229, *et. seq.*, 8 U.C.L.J. 35. If a seizure should be made within the thirty days, the execution would be partly executed, and the bailiff could go on and complete it after that time; see notes to section 218. Such a case could not be called a *neglect* to return an execution within this section. If the bailiff neglects to return any process or execution in the proper time, he forfeits his fees on it: see section 227 and notes thereto, and Rule 185 (a).

A False Return is also a criminal offence, if wilful: Criminal Code, 1892, section 143.

In the Opinion of the Judge or Jury.—This leaves it to the judge or jury to award damages commensurate to the loss: see *Macrae v. Clarke*, L.R. 1 C.P. 403.

This section seems to presume that the bailiff could, if he had been vigilant in the execution of his warrant of execution, have made the money. If there are circumstances which might show the contrary, we think the onus of proving them is cast upon the bailiff and his sureties: *Macrae v. Clarke*, L.R. 1 C.P. 403; *Hobson v. Thelluson*, L.R. 2 Q.B. 642.

The omission to return the execution within the prescribed time would of itself be *prima facie* evidence of neglect on the part of the bailiff.

The right to sue under this section would not be governed by any statutory right such as is accorded to suitors on bonds given in Division Court proceedings: see section 274. The jurisdiction to sue would be regulated by the law that would govern the case of any other cause of action for a similar wrong.

Hindering or Delaying Proceedings.—A clerk or bailiff who by his neglect hinders or delays any suit is liable to forfeit his fees in that suit and to pay to the party suffering therefrom any loss or damage sustained: Rule 195; see also section 38 and notes to section 36.

Loss of Office.—Under the rules the officers of the court are subject to forfeiture of office for any of the following offences: (1) For neglect by the bailiff to pay over money immediately on its receipt: Rule 186; (2) For purchasing or having a personal interest in litigious matter in their own court: Rule 196; (3) For acting directly or indirectly as agent for any party to a suit in court: Rule 197. See also sections 32, 36, 41, 54, 61, 62 and 286.

289. If a judgment is obtained in the action against the Bailiff and his sureties, execution shall immediately issue thereon, and in case of the departure or removal of the Bailiff from the limits of the County, the action may be commenced and carried on against his sureties alone, or against any one or more of them. R.S.O. 1887, c. 51, s. 281.

Issuing execution against bailiff and sureties.

Execution Shall Immediately Issue Thereon.—This takes away from the court in which the action is brought, the power of postponing the issue of execution in such suit against the bailiff and his sureties. If the bailiff departs or removes from the limits of the county, an action may be brought against his sureties jointly or severally for the recovery of the damage sustained. This is contrary to the general rule on the subject: *Exchange Bank v. Barnes*, 29 Gr. 270.

Whether the bailiff has departed or removed from the county is a question of fact to be determined in the ordinary way.

Two of the sureties could be sued together under this section in the event of the removal of the bailiff from the county: see notes to section 36.

ENFORCING PAYMENT OF FINES.

290. In case a Division Court imposes a fine under authority of this Act, the same may be enforced upon the order of the Judge, in like manner as a judgment for any sum adjudged therein, and shall be accounted for as herein provided. R.S.O. 1887, c. 51, s. 282.

Fines, how enforced by Division Courts.

Fines, How Enforced.—Provision is here made for fines imposed, whether payable for contempt or otherwise. The judge cannot order the imposition and enforcement of any fine unless some statutory enactment expressly confers the power.

The payment of the fine would not bar another action for the wrong, e.g., an assault: *Box v. Green*, 9 Ex. 503.

In Like Manner as a Judgment.—See notes to sections 218, 234 and 235.

And Shall be Accounted For.—See section 61. All fines must be paid over to the County Crown Attorney under section 301.

291. In all cases in which by this Act a penalty or forfeiture is made recoverable before a Justice of the Peace, such Justice may, with or without information in writing, summon before him the party complained against, and thereupon hear

How enforced by Justices of the Peace.

and determine the matter of the complaint, and on proof of the offence convict the offender and adjudge him to pay the penalty or forfeiture incurred, and proceed to recover the same. R.S.O. 1887, c. 51, s. 283.

Is Made Recoverable.—This has reference to summary convictions: see sections 55 and 284.

With or Without Information in Writing.—There must, however, be an information of one kind or the other to warrant the proceedings: *Caudle v. Seymour*, 1 Q.B. 889; *Appleton v. Lepper*, 20 C.P. 138; *Connors v. Darling*, 23 U.C.R. 550; *Stoness v. Lake*, 40 U.C.R. 320; *Crawford v. Beattie*, 39 U.C.R. 13; unless the defendant waives it: *R. v. Shaw*, 12 L.T. 470; *Blake v. Beech*, 1 Ex. D. 320.

The mode of bringing the accused before the justice would not be a good ground for quashing the conviction: *R. v. Menary*, 19 O.R. 691.

Convict the Offender.—The justice must observe the same regularity of proceeding as would be required of him on the trial of any other offence punishable on summary conviction.

But should the party voluntarily appear without the formalities required by this section and raise no objection, he could be proceeded against in the ordinary way: *R. v. Hughes*, 4 Q.B.D. 614.

In any proceeding under this or the following section, or in any other proceeding in the Division Court, for which a statutory form is given, it is sufficient to follow such form, although not strictly containing all which the statute requires: *Truax v. Dixon*, 17 O.R. 375; *Re Wilson v. The Quarter Sessions of Huron and Bruce*, 23 U.C.R. 301; *Spigener v. State*, 62 Ala. 383; 2 C.L.T. 125; *Thompson v. Farr*, 6 U.C.R. 390; *Reid v. McWhinnie*, 27 U.C.R. 289; *Cornwall v. The Queen*, 33 U.C.R. 106; *R. v. Johnson*, 8 Q.B. 102; *Fletcher v. Calthrop*, 6 Q.B. 880; *R. v. Marsh*, 2 B. & C. 717; *R. v. Hazzell*, 13 East, 139; *R. v. Ridgway*, 2 B. & Ald. 527; *Re Turner*, 9 Q.B. 80; *Nixon v. Nanney*, 1 Q.B. 747; *R. v. Jones*, 12 A. & E. 684; *R. v. Recorder of King's Lynn*, 3 D. & L. 725; *R. v. Hartley*, 20 O.R. 481; *R. v. Richardson*, 20 O.R. 514; *R. v. Inhabitants of Hickling*, 7 Q.B. 880, at p. 889.

Forms, though literally prescribed by the legislature, may be varied according to reason and common sense, so long as the material matters provided for are correctly given: *Gemmell v. Garland*, 12 O.R. at p. 142; *Mountashell v. O'Neill*, 5 H.L. Cas. 937; *Ex parte Stanford*, *Re Barber*, 17 Q.B.D. 259. The same principle was laid down by *Patterson, J.A.*, in *Norhote v. Brunker*, 14 A.R. 364, at p. 378. The courts will always endeavor to uphold the proceedings of a justice where it is obvious that he has been actuated by a desire to follow the directions of the legislature; and for obvious reasons justices will find it best to follow as nearly as possible the forms given in the statute: see also remarks of *Pollock, C.B.*, *Re Allison*, 10 Ex. 561, at p. 565, and of *Parke, B.*, in the same case, who said: "If justices substantially adopt the forms given, they do all that is required of them."

Form of
conviction.

292. In all cases where a conviction is had for any offence committed against this Act, the form of conviction may be in the words or to the effect following, that is to say:

Be it remembered, that on this day of in the year
of our Lord , *A.B.* is convicted before
one (or two as the case may be) of Her Majesty's Justices of the Peace for
the County of (or before , a County Judge of
the County of), acting under *The Division Courts Act*, of having

(state the offence): and I (or we), the said do
 adjudge the said to forfeit and pay for the same the sum of
 or to be committed to the Common Gaol of the County of
 for the space of
 (Given under hand and seal, the day and year afore-
 said.

R.S.O. 1887, c. 51, s. 284.

The Form of Conviction.—See the notes to the next preceding section.

PROTECTION OF PERSONS ACTING UNDER WARRANTS, ETC.

293. No action shall be brought against the Bailiff of a Division Court, or against any person acting by his order and in his aid, for anything done in obedience to any warrant under the hand of the Clerk and seal of the Court, until a written demand, signed by the person intending to bring the action of the perusal, and a copy of the warrant has by such person, his solicitor or agent, been served upon or left at the residence of the Bailiff, and the perusal and copy have been neglected or refused for the space of six days after the demand. R.S.O. 1887, c. 51, s. 285.

Demand of perusal and copy of warrant to be made before action.

Acting Under Warrant.—A clerk issuing a warrant under the seal of the court and a bailiff and his assistants acting thereunder, are protected, even assuming that the judge has no jurisdiction to make the order under which the warrant is founded: *Aspey v. Jones*, 33 W.R. 217; *London (Mayor) v. Cox*, L.R. 2 H.L. 269; *Davis v. Fletcher*, 2 E. & B. 271.

Protection of Persons Acting Under Warrants, Etc.—The public interest requires that officers who really act in obedience to a warrant should be protected. In such cases, therefore, the Act has provided that the remedy of the party grieved shall be confined to the clerk as well where he has issued a warrant within his jurisdiction as where the warrant he has issued is improper. The Act takes it for granted, if after demand a perusal has been allowed, that the officer may be said to act in obedience to the warrant, though the clerk had no jurisdiction, and though the warrant be an absolute nullity: *Price v. Messenger*, 2 B. & P. 158; 5 R.R. 559.

The protection is given notwithstanding the defect appears by the warrant.

This protection is not merely conferred on the officer, but is extended to anyone, "acting by his orders and in his aid," in the due execution of the process of the court: see, also, 9 U.C.L.J. 317; *Pearson v. Ruttan*, 15 C.P. 79; *Pedley v. Davis*, 10 C.B.N.S. 492.

The bailiff is protected, under this section, only when he is sought to be made responsible for some defect in the process under which he acts: *Stewart v. Cowan*, 40 U.C.R. 346.

Against Any Person Acting by his Order.—The person must be acting under the authority of a bailiff, and in his aid: *Postlethwaite v. Gibson*, 3 Esp. 226.

A demand upon such person would be insufficient; it must be made upon the bailiff: *Clarke v. Davey*, 4 Moore 465.

A gaoler who received the person named in a warrant of commitment from the bailiff would be protected: *Butt v. Newman*, Gow 97.

A constable *de facto*, while acting in the discharge of his duty, is entitled to the same protection as if his title to the office he professes to fill were undisputed: *R. v. Gibson*, 29 N.S.R. 4.

A Written Demand.—The demand should be made out in duplicate and signed by the party himself: *Toms v. Cumming*, 7 M. & G. 88, 92. But if signed by his attorney it will, it seems, be sufficient: *Clark v. Woods*, 2 Ex. 395.

The party, by his conduct, may dispense with the perusal: *Atkins v. Kilby*, 11 A. & E. 777.

It would be unnecessary to make a demand where no action would lie against the clerk: *Sturch v. Clarke*, 4 B. & Ald. 113; *Cotton v. Kadwell*, 2 N. & M. 399; *Sly v. Stevenson*, 2 C. & P. 464.

If the warrant commands the bailiff to seize the goods of A., and he seizes those of B., no demand is necessary: *Parton v. Williams*, 3 B. & Ald. 330; or if he acts beyond what is required by the warrant or out of his own county: *Gladwell v. Blake*, 1 C.M. & R. 636; or does a wrong, not acting or believing he is acting in the discharge of his duty as bailiff: *Stewart v. Cowan*, 40 U.C.R. 346; or if he broke and entered a house to seize goods: *Bell v. Oakley*, 3 M. & S. 259; or if he seized other goods than those authorized by the warrant: *Price v. Messenger*, 2 B. & P. 158; *Crozier v. Cundey*, 6 B. & C. 232; or if he arrests A. under a warrant against B., though A. may have been the person intended: *Hoye v. Bush*, 1 M. & G. 775.

See English County Court Act, 1888, ss. 53 and 54; *Re Locke, Ex parte Popperton*, 62 L.T. 942; 63 L.T. 320.

Signed by the Person.—If signed by the party's solicitor it will be sufficient: *Clark v. Woods*, 2 Ex. 395.

Served Upon.—See notes to sections 103 and 113.

Left at the Residence.—See notes to section 99. A notice left by the clerk of the party's solicitor is sufficient: *Clark v. Woods*, 2 Ex. 395.

Six Days After Such Demand.—The demand need not specify any time, and if a different time is mentioned than that allowed by the statute, it is immaterial: *Collins v. Rose*, 5 M. & W. 194.

The sections apply to actions of trespass and case only: *Lyons v. Golding*, 3 C. & P. 586; and not to assumpsit, replevin, or the like: *Gay v. Matthews*, 4 B. & S. 425.

Bailiff
entitled to
verdict on
production
of warrant.

294. In case, after the demand and compliance therewith by showing the warrant to and permitting a copy thereof to be taken by the person demanding the same, an action is brought against the Bailiff or other person who acted in his aid for any such cause without making the Clerk who signed or sealed the warrant a defendant, then on producing or providing the warrant at the trial, the jury shall give their verdict for the defendant, notwithstanding any defect of jurisdiction or other irregularity in or appearing by the warrant. R.S.O. 1887, c. 51, s. 286.

By the Person Demanding the Same.—The bailiff should, within the prescribed time after such demand, show the warrant and permit a copy thereof to be taken by the person demanding the same. If he does so, and an action is brought against him or the person acting by his order or in his aid, either with or without making the officer of the court who

signed or sealed the warrant a defendant, then, on the production or proof of such warrant at the trial, the jury will be directed to find for the bailiff, notwithstanding a defect of jurisdiction or other irregularity in or appearing by the warrant.

The bailiff should have the warrant in his possession when he acts upon it: *Galliard v. Laxton*, 2 B. & S. 363; *R. v. Chapman*, 12 Cox C.C. 4; *Codd v. Cabe*, 1 Ex. D. 352.

Though the party may have obtained a copy of the warrant, before making the demand, the bailiff must comply with the demand: *Clark v. Woods*, 2 Ex. 395.

On Producing or Proving the Warrant.—The production or proof of the warrant is necessary to free the bailiff from responsibility: see *Peppercorn v. Hoffman*, 9 M. & W. 618; *Kalar v. Cornwall*, 8 U.C.R. 168. And the fact that it was at the time with the gaoler is no answer: *Arnott v. Brady*, 23 C.P. 1; unless the party on information of this circumstance made no objection: *Atkins v. Kilby*, 11 A. & E. 777. Though the clerk may be joined with the bailiff in an action, the bailiff will not be discharged unless he has complied with the demand: *Clark v. Woods*, 2 Ex. 395.

295. If an action is brought jointly against the Clerk and Bailiff, or the person who acted in his aid, then on proof of the warrant the jury shall find for the Bailiff or the person who so acted, notwithstanding such defect or irregularity as aforesaid; and if a verdict is given against the Clerk, the plaintiff shall recover his costs against him, to be taxed by the proper officer in such manner as to include the costs which the plaintiff is liable to pay to the defendant for whom a verdict has been found. R.S.O. 1887, c. 51, s. 287.

Proof of Warrant.—See notes to section 293 and 294. Should a judgment be given against the clerk and for the bailiff, the clerk would be liable to pay the plaintiff the bailiff's costs against him; but they must be taxed in the manner pointed out by the section.

296. In such action the defendant may plead not guilty, entering a note of this Act in the margin, and in such case may thereupon avail himself of the matters of defence herein given. R.S.O. 1887, c. 51, s. 288.

The plea of not guilty by statute, is usually permitted in such cases as those where officers or persons who are sued for something done in discharge of their public or official duties. It is not, however, confined to such cases.

A plaintiff who voluntarily accompanied and assisted a bailiff in seizing goods was held entitled to the same rights on this plea as the bailiff: *Culverson v. Melton*, 2 M. & Rob. 200.

The defendant may go into any defence which could be set up at common law under the general issue whether founded entirely on the statute, or partly on the statute and partly not, or wholly independent of the statute: *Maund v. Monmouthshire Canal Co.*, 1 Car. & M. 606; *Ross v. Clifton*, 11 A. & E. 631; *Fisher v. Thames Junction Ry. Co.*, 5 Dowl. 773. For instance, contributory negligence may be given in evidence under this plea in an action of negligence: *Doan v. Michigan Cent. Ry. Co.*, 17 A.R. 481.

Where clerk and bailiff both sued and bailiff proves warrant.

Defendant may plead "Not guilty by statute."

The plaintiff cannot oust the defendant of this plea by waiving the tort and suing in contract: *Calvert v. Moggs*, 10 A. & E. 632.

The plea should refer to the statute which allows the plea as well as any other statute relied on by the defence: *Van Natter v. Buffalo & Lake Huron Ry. Co.*, 27 U.C.R. 581.

Where it is intended to rely upon the want of service of a notice of action, the particular section requiring notice must be referred to: *Bond v. Conmee*, 15 O.R. 716; 16 A.R. 398.

If, however, the plaintiff is not taken by surprise, an amendment is almost a matter of course: *Edwards v. Hodges*, 15 C.B. 477; *Van Natter v. Buffalo & Lake Huron Ry. Co.*, 27 U.C.R. 581.

Particulars of the defence were ordered in *Jennings v. G.T. Ry. Co.*, 11 P.R. 300. In the higher courts such particulars could in any event be elicited on an examination for discovery.

Notice of Defence.—If a bailiff intends to rely on this section as a defence to an action against him in the Division Court notice must be given as in the case of any other statutory defence: *Denny v. Bennett*, 44 W.R. 333; *Eng. C.C. Rules*, 1888, Ord. X, rr. 10, 18 A. See section 134 and notes thereto: Rules 104 and 115.

GENERAL PROVISIONS WITH REGARD TO ACTIONS FOR THINGS DONE UNDER THIS ACT.

Distress not to be deemed unlawful or persons making it trespassers by reason of defect in proceedings.

297. No levy or distress for a sum of money to be levied by virtue of this Act shall be deemed unlawful, or the person making the same be deemed a trespasser, on account of any defect or want of form in the information, summons, conviction, warrant, precept or other proceeding relating thereto, nor shall the person distraining be deemed a trespasser from the beginning, on account of any irregularity afterwards committed by him; but the person aggrieved by the irregularity may recover full satisfaction for the special damage. R.S.O. 1887, c. 51, s. 289.

Any Defect or Want of Form.—The tendency of modern legislation is in favor of preventing any formal defect, defeating the ends of justice, or subjecting a person who acts honestly to an action for damages: *Crawford v. Beattie*, 39 U.C.R. 13, and cases there cited; see *Alderich v. Humphry*, 29 O.R. 427.

This section bears a close resemblance to section 19 of the English statute, 11 Geo. II., c. 19, in respect of an action for an irregular and illegal distress for rent, which provides that where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining or his agent, the distress shall not be deemed unlawful nor the distrainer a trespasser *ab initio*; but the party grieved may recover satisfaction for the damage in a special action of trespass on the case, at the election of the plaintiff, and if he recover he shall have full costs.

A Trespasser from the Beginning.—"When entry, authority or license is given by the law and he doth abuse it, he shall be a trespasser *ab initio*. But where an entry, authority or license is given by the party and he abuses it, then he must be punished for his abuse, but shall not be trespasser *ab initio*." *Six Carpenter's Case*, 8 Coke, 146a; 1 Smith's L.C.

261. Not doing cannot make the party who has authority or license by the law a trespasser *ab initio*, because not doing is no trespass: *Ib.*

The distinction is that if the party be a trespasser from the beginning, the jury may award damages for the trespass, but if the party is merely punished for special damage, actual loss must be proved and the damages confined to such loss.

Satisfaction for the Special Damage.—Special damage must be proved, and if not, the plaintiff could not recover even nominal damages, and the verdict or judgment should be for the defendant: *Lucas v. Tarleton*, 3 H. & N. 116; *Rodgers v. Parker*, 18 C.B. 112; see also *Fell v. Whittaker*, L.R. 7 Q.B. 120; *Shultz v. Reddick*, 43 U.C.R. 155.

Special damage must be claimed, otherwise it is not recoverable, and it must be alleged with certainty so as to enable the defendant to meet it by counter-evidence, if untrue: *Westwood v. Cowne*, 1 Stark. 172; see also *Croft v. Boite*, 1 Wms. Saund. 243, d. (5); *Martin v. Henrickson*, 2 Ld. Raym. 1007; *Ashley v. Harrison*, 1 Esp. 48; *Tilk v. Parsons*, 2 C. & P. 201; *Finlay v. Chirney*, 20 Q.B.D. 494; *Catton v. Gleason*, 14 P.R. 226.

298. Any action or prosecution against any person for anything done in pursuance of this Act shall be commenced within six months after the fact was committed, and shall be laid and tried in the county where the fact was committed, and notice in writing of the action and of the cause thereof shall be given to the defendant one month at least before the commencement of the action. R.S.O. 1887, c. 51, s. 290.

Limitation of actions for things done under this Act.

In Pursuance of this Act.—The protection of the statute extends to all persons intending to act within them: *Briggs v. Evelyn*, 2 H. Bl. 114; 3 R.R. 354. If it be equivocal in what capacity the party acted, notice should be given: *Morgan v. Palmer*, 2 B. & C. 729. Even though a party acted without jurisdiction, he is entitled to notice of action, if he acted in the honest belief that he was acting in the execution of his duty: *Sinden v. Brown*, 17 A.R. 173; *Hermann v. Seneschal*, 13 C.B.N.S. 392; *Selmes v. Judge*, L.R. 3 Q.B. 724; *Roberts v. Orchard*, 2 H. & C. 769; *Leete v. Hart*, L.R. 3 C.P. 322; *Calder v. Halket*, 3 Moo. P.C. 36 n; *Venning v. Steadman*, 9 S.C.R. 238; *McGuinness v. Dufoe*, 23 A.R. 704; *Alderich v. Humphrey*, 29 O.R. 427; but if he has acted colorably and vexatiously from any malicious or corrupt feeling, without believing he had authority to do what he did, he is not entitled to notice: *Bross v. Huber*, 18 U.C.R. 282. And if there is no evidence of honest belief in the right to do the act, the court will hold the notice of action to be unnecessary: *Friel v. Ferguson*, 15 C.P. 584; *Ibbottson v. Henry*, 8 O.R. 625; but see *Bross v. Huber*, 18 U.C.R. 282.

If there is evidence of want of good faith, the question must be submitted to the jury if the plaintiff desire it: *Neill v. McMillan*, 25 U.C.R. 485; *Stewart v. Cowan*, 40 U.C.R. 346; *Allen v. McQuarrie*, 44 U.C.R. 62; *Sinden v. Brown*, 17 A.R. 188.

A judge would be entitled to notice of action, even though the action was brought for making an order for committal after prohibition, if the judge acted under *bona fide* belief that his duty as judge rendered it incumbent on him to do so, notwithstanding the prohibition: *Booth v. Clive*, 10 C.B. 827.

A bailiff acting under a warrant without a seal is entitled to notice: *Anderson v. Grace*, 17 U.C.R. 96.

If in fact disqualified from acting, a party acts in the *bona fide* belief that he is qualified, he is entitled to notice: *Hughes v. Buckland*, 15 M. & W. 346; *Lea v. Facey*, 19 Q.B.D. 352.

The plaintiff cannot by waiving the tort and suing in assumpsit, avoid giving notice of action: *Waterhouse v. Keen*, 4 B. & C. 211. Therefore, where a defendant had wrongfully received money and kept it, and the plaintiff sued for money had and received, the want of notice of action was held fatal to his case: *Midland Ry. Co. v. Withington Local Board*, 11 Q.B.D. 788.

If an act was wrongful, but the defendant relies upon his honest belief to do the act as giving him the right to notice, some facts must be shown which might give rise to that belief, but it is not necessary that the belief should be reasonable: *Chamberlain v. King*, L.R. 6 C.P. 474.

A bailiff is entitled to notice of action even if indemnified: *Sanderson v. Coleman*, 4 U.C.R. 119; *Lough v. Coleman*, 29 U.C.R. 367; or, if, having an execution against the goods of A. he takes the goods of B.: *Pardee v. Glass*, 11 O.R. 275; *Burling v. Harley*, 3 H. & N. 271; *Dale v. Cool*, 4 C.P. 460; also in an action for excessive seizure, and exacting more than he is entitled to: *Pearson v. Ruttan*, 15 C.P. 79.

Where the act has not been done in the capacity of officer, but is wholly *diverso intuitu*, notice is not required, as where goods not liable to seizure are seized as forfeited, and money is taken to release them, in an action to recover such money no notice is requisite: *Irving v. Wilson*, 4 T.R. 485; 2 R.R. 444; so where an unlawful fee is taken for doing or omitting to do something if the fee could not be taken in the character of officer, no notice is requisite: *Morgan v. Palmer*, 2 B. & C. 729.

If a seizure is made for two causes, as to one only of which the officer is entitled to notice of action, he is nevertheless liable in trespass as to the other, without notice: *Lamont v. Southall*, 5 M. & W. 416. No notice is required to recover an excess of money made under execution: *Dale v. Cool*, 6 C.P. 544; *McLeish v. Howard*, 3 A.R. 503.

If a person is not duly appointed a bailiff, he is not entitled to notice of action: *Tarrant v. Baker*, 14 C.B. 199.

Notice is not necessary where the act complained of was not done in the performance of a public duty: *Davidson v. Garrett*, 30 O.R. 653.

A party who sets proceedings in motion is not entitled to notice of action; it is only intended to protect officers who carry them out: *Palk v. Kenney*, 11 U.C.R. 350; *Dollery v. Whaley*, 8 U.C.L.J. 239; but see *Gayton v. Bayman*, 1 F. & F. 675.

Notice of action is not required in the following actions: *Replevin*: *Fletcher v. Wilkins*, 6 East, 283; *Lewis v. Teal*, 32 U.C.R. 108; *Apple-garth v. Graham*, 7 C.P. 171; *Kennedy v. Hall*, 7 C.P. 218; *Folger v. Minton*, 10 U.C.R. 423; *Gay v. Matthews*, 4 B. & S. 425; but see *Ibbottson v. Henry*, 8 O.R. 625; where the principal object of the action is an injunction; *Flower v. Local Board of Low Leyton*, 5 Ch. D. 347; *Chapman v. Guardians of Auckland Union*, 23 Q.B.D. 294; an action *in rem*: *The Longford*, 14 P.D. 34; an action to recover land: *Foat v. Mayor of Margate*, 11 Q.B.D. 299; see also illustrating the points above noted; *Jolliffe v. Wallasey Local Board*, L.R. 9 C.P. 62; *Griffith v. Taylor*, 2 C.P.D. 194; *Smith v. West Derby Board*, 3 C.P.D. 423; *Davis v. Moore*, 4 U.C.R. 209; *Anderson v. Grace*, 17 U.C.R. 96; *Ross v. McLay*, 40 U.C.R. 83, 87; *Joule v. Taylor*, 7 Ex. 58; *Pryce v. Hole*, 6 T.L.R. 195; *Rochfort v. Rynd*, 8 L.R. Ir. 204; *O'Dea v. Hickman*, 18 L.R. Ir. 233; *Fielden v. Morley*, (1899) 1 Ch. 1; *Shaw v. Hertfordshire*, (1899) 2 Q.B. 282.

Where notice of action is necessary it is a condition precedent to the right of suing: *Clarkson v. Musgrave*, 9 Q.B.D. 390.

The want of notice must be raised at the trial: *Moran v. Palmer*, 13 C.P. 450, 528; and in the High Court and County Courts by the statement of defence: *Verratt v. McAulay*, 5 O.R. 313; *McKay v. Cummings*, 6 O.R. 400.

In the Division Courts notice of the statutory defence should be given six days before the trial under section 134: *Smith v. Pritchard*, 2 C. & K. 699; *Allwright v. Perks*, 9 T.L.R. 235.

Within Six Months.—The day of doing the act must be excluded: *Young v. Higgon*, 6 M. & W. 49; *Hanns v. Johnston*, 3 O.R. 100; *Re Gallant*, 11 C.L.T. 138; *Hardy v. Kyle*, 9 B. & C. 603; *Edgar v. Magee*, 1 O.R. 287.

Venue.—The action must be laid and tried in the county where the fact was committed. But, under section 93, it may be tried in the division the place of sitting of which is nearest to the residence of the clerk or bailiff, though in another county: *Partridge v. Elkington*, L.R. 6 Q.B. 82; see *Watson v. White*, (1896) 2 Q.B. 9.

And of the Cause Thereof.—The plaintiff will be confined to the cause mentioned in the notice: *Obernier v. Robertson*, 14 P.R. 553; see *Conmee v. Weidman*, 16 P.R. 239. It need not state the form of action: *Prickett v. Gratrex*, 8 Q.B. 1020; nor whose goods were seized, nor the amount of damages: *Barton v. De Gros*, 11 L.T. 270.

The notice must state the time and place of trespass complained of; *Moore v. Gidley*, 32 U.C.R. 233; *Oliphant v. Leslie*, 24 U.C.R. 398; *Martins v. Upeher*, 3 Q.B. 662; *Parkyn v. Staples*, 19 C.P. 240; *Sprung v. Anderson*, 23 C.P. 152; *Scott v. Reburn*, 25 O.R. 450; but a mistake as to the locality, not calculated to deceive, will not vitiate it: *Madden v. Kensington Vestry*, (1892) 1 Q.B. 614; *Bond v. Conmee*, 15 O.R. 716; 16 A.R. 398; *Langford v. Kirkpatrick*, 2 A.R. 513; *Green v. Hutt*, 51 L.J.Q.B. 640.

The notice need not have the name, etc., of the plaintiff or his solicitor indorsed: *McPhatter v. Leslie*, 23 U.C.R. 573.

In an action against a bailiff for seizing goods exempt, it is not necessary to endorse on the notice of action the name and abode of the plaintiff: *McMartin v. Hurlburt*, 2 A.R. 146. A compliance with this section, and not with chapter 88 of the revised statutes is all that is required: *Id.*; see also *Stephens v. Stapleton*, 40 U.C.R. 353.

It is not necessary to state in what court the action will be brought: *Hanns v. Johnston*, 3 O.R. 100; but if a court is mentioned, the writ must be issued from that court: *Buck v. Hunter*, 20 U.C.R. 436.

It is not necessary that the notice be in one document; it may be contained in a series of letters if in the result the cause of action and the other particulars required are disclosed: *Lamley v. Mayor of East Retford*, 55 J.P. 133; see *Cox v. Hamilton Sewer Pipe Co.*, 14 O.R. 300.

A reference to a statute which does not apply will not invalidate the notice; if it give notice of the action and the cause thereof, it is sufficient: *Macgregor v. Galsworthy*, 3 C. & K. 8.

Where malice is a necessary ingredient, the word "maliciously" must be used: *Howell v. Armour*, 7 O.R. 376; *Scott v. Reburn*, 25 O.R. 450; *Kelly v. Archibald*, 26 O.R. 608; 22 A.R. 522.

Where the notice of action stated that one month after service of the notice an action would be brought, etc., and for malicious, etc., destruction of goods and for damages for loss of time and injury to business, and for the recovery of costs and expenses, etc., "the same having been committed by you against me in the month of May last at the village of M. and at the town of P.," and the notice was served on one of the defendants personally and on the agent of the other defendant at M., and a copy was also left for him at his place of residence at P. and another copy served on his solicitors, and this defendant also admitted that he had seen the notice though it was not shown at what time or place he had seen it: *Held*, that the notice and service were sufficient: *Bond v. Conmee*, 16 A.R. 398; see *Jones v. Grace*, 17 O.R. 681.

The notice should be signed by the plaintiff or his attorney and give the residence or place of business of one of them: *Kemble v. McGarry*, 6 O.S. 570; *Bates v. Walsh*, 6 U.C.R. 498.

The defendant may waive a defect in the notice: *Donaldson v. Hailey*, 13 C.P. 87.

Reasonable certainty only is required, so as to identify the acts complained of, and prevent defendant being misled: *Langford v. Kirkpatrick*, 2 A.R. 513.

A notice given in the name of a party who is dead at the time of service thereof, is insufficient: *Pilkington v. Riley*, 3 Ex. 739.

For form of notice, see Form 310: *Burton v. LeGros*, 34 L.J.Q.B. 91.

Service of Notice.—The service need not be personal; leaving it with the officer's wife at his dwelling house was held sufficient: *Hanns v. Johnston*, 3 O.R. 100. The notice need not be served by the party, his solicitor or agent in person, but may be served by any other literate person; for instance, the attorney's clerk: *Cuming v. Toms*, 7 M. & G. 29.

The provisions of Rule 241 to sending notices by mail do not apply to a notice of action as the rules is limited to cases in which notice is given of "set-off, counterclaim or other defence."

One Month at Least.—Notice of the action given on the 28th April, and the action commenced on 29th May following, is sufficient: *Freeman v. Read*, 4 B. & S. 174. There must be an interval of at least one month, the day of service and the last day of the month both being excluded: *Re Railway Sleeper's Supply Co.*, 29 Ch.D. 208; *Radeliffe v. Bartholomew*, (1892) 1 Q.B. 161; *Dempsey v. Dougherty*, 7 U.C.R. 313; *Young v. Higgin*, 6 M. & W. 49.

Defendant may tender amends and plead the general issue, etc.

299. If tender of sufficient amends is made before action brought, or if the defendant, after action brought, pays a sufficient sum of money into Court with costs, the plaintiff shall not recover, and in such action the defendant may plead not guilty, and give any special matter in evidence under that plea. R.S.O. 1887, c. 51, s. 291. [See also *Cap. 88*.]

Sufficient Amends.—A tender of amends will not cure a defect in the notice of action: *Martins v. Upeher*, 3 Q.B. 662.

If a tender of sufficient amends is made before action, it need not be pleaded; neither need the amount be paid into court: *Jones v. Gooday*, 9 M. & W. 736.

If the tender should be pleaded, the plaintiff should reply that the defendant did not tender, or that the sum was insufficient, and not that the defendant did not tender sufficient amends: *Williams v. Price*, 3 B. & Ad. 695.

The effect of not pleading the tender and paying money into court will be to prevent the defendant from giving evidence of it. But whether pleaded or not, if the verdict of the jury should be less than the amount tendered, the plaintiff "shall not recover": *Jones v. Gooday*, 9 M. & W. 736.

If no tender is made the defendant may pay a sum into court, but it is necessary that costs be also paid in: see section 131, *ante* p. 224.

If the money paid in is sufficient, the plaintiff "shall not recover."

As to what is a sufficient tender, see notes to section 128.

Not Guilty.—A plea of not guilty under section 296, entitles a defendant to "avail himself of the matters of defence herein given." This section gives to such plea a wider effect. The cases applicable to such plea will be found noted under section 296.

See also Rules 170, 171, 244, 245 and 246.

300. In case an action is brought in any Court of Record in respect of any grievances committed by any Clerk, Bailiff or officer of a Division Court, under colour or pretence of the process of such Court, and the jury upon the trial find no greater damages for the plaintiff than \$10, the plaintiff shall not have costs unless the Judge certifies in writing that the action was properly brought in such Court of Record. R.S.O. 1887, c. 51, s. 292.

Plaintiff not to have costs where verdict not over ten dollars without certificate.

Grievances Committed by any Clerk, etc.—This section only applies to "officers" of the courts: *Palk v. Kenney*, 11 U.C.R. 350; *Dollery v. Whaley*, 8 U.C.L.J. 239.

Under Color or Pretence of the Process.—This, perhaps, means practically the same as intending or professing to act in the execution of his duty as clerk, bailiff or officer under process of the court.

Shall Not Have Costs.—It is to be observed that the section only applies to actions brought in Courts of Record: see section 7, and notes thereto.

The plaintiff recovers no costs whatever without the certificate. In other cases he would be entitled to costs according to the court in which the action might have been brought: C.R. 1133, and, if the judge made no order to the contrary, the defendant would have a right of set-off: C.R. 1132; *Bennett v. White*, 13 P.R. 149; *Truax v. Dixon*, 13 P.R. 279.

Action Was Fit to be Brought in Such Court.—It is submitted that this means an action in which the jury may think proper to give not more than \$10 damages, although the evidence would have warranted a larger sum, for which the plaintiff reasonably made claim, or one in which the point involved is of general importance.

The fact that the plaintiff may recover more than \$10 will not entitle him to full costs. He will still be subject to C.R. 1132 and 1133: *McNair v. Boyd*, 14 P.R. 132; *Baskerville v. Vose*, 15 P.R. 122.

DISPOSAL OF FINES.

301. The moneys arising from any penalty, forfeiture or fine imposed by this Act, not directed to be otherwise applied, shall be paid to the Clerk of the Court which imposed the same, and shall be paid by him to the County Crown Attorney of the County, to be by him paid over to the Provincial Treasurer, and shall form part of the Consolidated Revenue Fund. R.S.O. 1887, c. 51, s. 293.

Fines, how disposed of.

Arising From Any Penalty.—See sections 133 (disobeying subpoena), 168 (jurors disobeying summons), 170 (neglect of clerk of municipality), 283 (contempt of court), 284 (resisting officer). An action would lie against the clerk's sureties for non-payment.

DISPOSAL OF MONEYS PAID INTO COURT.

Clerk to
mail notice
of payment
of money.

302. The Clerk of every Division Court shall, immediately after the receipt of any sum of money whatever for any party to an action, forward through the post office, to the party entitled to receive the same, a notice enclosed in an envelope addressed to such party, or in the case of a transcript of judgment from another Court, then to the Clerk who issued the same, at his proper post office address, informing him of the receipt of the money; the notice thus sent shall be prepaid and registered, and the Clerk shall obtain and file among the papers in the action the post office certificate of the registration, and shall deduct the postage and charge for registration from the moneys in his hands, but he shall charge no fee for the notice; the absence of the certificate of registration from among the papers in the action shall be *prima facie* evidence against the Clerk that the notice has not been forwarded. R.S.O. 1887, c. 51, s. 294.

Immediately After the Receipt.—The words "shall immediately" here used, denote both an imperative and peremptory command. They imply "prompt, vigorous action, without any delay." When the act is one which is capable of being done without delay no delay can be permitted: *per* Jessel, M.R., *Re Southam, Ex parte Lamb*, 19 Ch. D. 169; see also *Forbes v. Cobb*, 18 Q.B.D. 494, at p. 504; *Lowe v. Fox*, 15 Q.B.D. 679, *per* Bowen, L.J.; *Stroud*, 301. It will be observed that the words here employed are "*any sum whatever*." Whether the sum be large or small the notice is required to be given by the clerk. The party entitled to the notice could waive the giving of it; but in order to justify the clerk in omitting to give it, he should, for his own protection, take the waiver in writing. Should the inspector find that such notice had not been given in any case where not dispensed with, he would probably reprimand the officer, and if such practices became general, it would be his duty to report such conduct to the Government, under section 63 of this Act. Should the provisions of the section not be complied with the executive has, under section 31, the power to exercise a summary remedy. No particular form of notice is necessary so long as it gives the necessary information. It may be in the following form or to the like effect:

In the Division Court for the County of A.B., Plaintiff v. C.D., Defendant. Take notice that the sum of \$ has this day been paid into court to your credit in this cause.

Dated this day of , 19 , Clerk.

To A.B., the plaintiff (or as the case may be).

On entering a claim for suit or a notice of defence, the parties are required to leave their addresses, or that of their solicitors or agents, and the delivery of any notice to them or the mailing thereof to such address by the clerk is sufficient service: Rule 241. The notice to be given under this section must be sent by mail and registered, and the registration receipt kept with the papers as evidence of compliance with the requirements of the section: see also Rule 163, which is identical with this section.

By Rule 247, all money is payable to the parties at the clerk's office. If the party entitled to it desires money sent to him, written directions as to the mode of transmission are to be given, and the money so transmitted will be at the risk of the party giving directions and sent at his expense. An action is not maintainable against the clerk, or his sureties, for failure to pay money in his hands without demand at his office: *McLeish v. Howard*, 3 A.R. 509.

Transcript of Judgment From Another Court.—The clerk of the foreign court must not transmit the money, when collected, to the clerk of the home court without a written order signed by the party entitled to it: Rule 248. See notes to sections 223 and 225.

Moneys Cannot be Withheld on any Pretence.—The clerk and bailiff cannot on any pretence whatever withhold suitors' moneys. It is the property of the suitor and no deduction can be made therefrom except for unpaid costs in the action in which such moneys are recovered: Rule 164.

When money is received by the clerk on a suit entered by a solicitor or agent, who has paid the deposit and is responsible for costs, it must not be paid out without notice to such solicitor or agent, unless upon the order of the judge: Rule 165.

303. All sums of money which have been paid into Court to the use of any party, and which have remained unclaimed for the period of six years after the same were paid into Court, or to the officers thereof, and all sums of money in the hands of the Clerk or Bailiff, paid into Court, or to the officers thereof, to the use of any suitor shall, if unclaimed for the period of six years after the same were so paid, form part of the Consolidated Revenue Fund, and be paid over by the Clerk or officer holding the same to the County Crown Attorney of his County, to be by him paid over to the Treasurer of the Province, and no person shall be entitled to claim any sum which has remained unclaimed for six years. R.S.O. 1887, c. 51, s. 295.

Unclaimed
moneys to
be paid over
to County
Crown
Attorney.

Unclaimed for the Period of Six Years.—This is virtually a Statute of Limitation upon the rights of the party to whose use the money was paid in: see *Williamson v. McCrary*, 33 Ark. 470.

But we submit that the forfeiture here declared can only come into operation where the party entitled has either notice of it under the next preceding section, or otherwise. It might be that a clerk would fail to give notice of the money having been paid in, or he might deny that he received it, so that we think, under these circumstances, it would not be "unclaimed" money within the meaning of this section: *Gibbs v. Guild*, 9 Q.B.D. 59.

We cannot see that the wrong of another should operate as a confiscation of the property of an innocent party: see *Atty.-Gen. v. O'Reilly*, 6 A.R. 576.

In this view the six years would only commence to run when the party entitled knew, or should but for his own neglect have known, that it was in court for him.

Under section 51 a list of these moneys must be made annually in the month of January, and a copy of it put up in the clerk's office; and

during court hours it must be exhibited in some conspicuous place in the court-house or place where the court is held. A return of such moneys must also be made annually in the month of January under oath, according to Form 221, and transmitted to the County Crown Attorney together with the money, and if no money remains unclaimed the fact must be stated in the affidavit: Rule 178. See notes to section 51, *ante* p. 40.

Claims of persons under disability not to be prejudiced.

304. No time during which the person entitled to claim such sum was an infant or of unsound mind, or out of the Province, shall be taken into account in computing the six years. R.S.O. 1887, c. 51, s. 296.

The time would cease to run while any of these disabilities continued: contrast *Penny v. Brice*, 18 C.B.N.S. 393.

The section is very different from R.S.O. c. 72, s. 3.

GENERAL RULES AND ORDERS.

Board of Judges and their authority to frame rules continued.

305. The existing Board of County Judges with authority to make rules relating to Division Courts shall continue until superseded or revoked by the Lieutenant-Governor; and all Rules and Forms heretofore made relating to Division Courts and in force when this Act takes effect shall, so far as applicable, remain in force until otherwise ordered under the provisions of this Act. R.S.O. 1887, c. 51, s. 297.

The section providing that the rules are to continue in force was probably unnecessary, for notwithstanding the formal repeal of the Acts under which they were made, the revision really preserves them in unbroken continuity: *License Commissioners of Frontenac v. County of Frontenac*, 14 O.R. 741.

The rules now governing proceedings came into force on the 1st July, 1894, and the rules then in force ceased to be operative. They apply to all proceedings begun after that date and to proceedings commenced prior to that date as far as necessary, if applicable, otherwise the former rules govern such last mentioned proceedings: Rule 1.

The Lieutenant-Governor may appoint five County Judges to frame rules, etc.

306.—(1) The Lieutenant-Governor may from time to time appoint and authorize five of the County Judges, who shall be styled "The Board of County Judges," to frame General Rules and Forms concerning the practice and proceedings of the Division Courts, and the execution of the process of such Courts, with power also to frame rules and orders in relation to the provisions of this Act, or of any future Act respecting such Courts, as to which doubts have arisen or may arise, or as to which there have been or may be conflicting decisions in any of such Courts.

Retired Judge may be appointed.

(2) The Lieutenant-Governor may appoint any retired County Judge to be one of the members of the Board.

(3) The Board may also from time to time make Rules for the guidance of Clerks and Bailiffs, and in relation to the duties and services to be performed, and to the fees to be received by them; and, subject to section 57, may also substitute other fees in lieu of fees payable to Clerks and Bailiffs under any rule, order or statute.

Rules
respecting
clerks and
bailiffs.

(4) The Board may from time to time alter or amend any Rules or Orders made for the Division Courts, and may for any Division Court Division, embracing a City or part of a City, establish a lower tariff of fees from that established for County Division Courts. R.S.O. 1887, c. 51, s. 298.

Amend-
ment of
rules.

(5) The Inspector of Division Courts for the time being shall be a member of the said Board. 57 V. c. 23, s. 3.

Inspector
to be a
member of
Board.

Scope of Board's Power.—The authority given by this section to the Board of County Judges is very extensive. All questions of the procedure by which legal or equitable rights, within the jurisdiction of the Division Courts, may be enforced or extinguished may be dealt with. The word "practice" in the section, "denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which, by means of the proceeding, the court is to administer the machinery as distinguished from its product," *per* Lush, L.J., *Poyser v. Minors*, 7 Q.B.D. at p. 333. The board would have full power to pass a rule declaring that a nonsuit should have the same effect as a judgment upon the merits, for the defendant: *Poyser v. Minors*, 7 Q.B.D. 329.

The further power is given to the board to interpret any doubtful enactment respecting Division Courts, and their interpretation, when approved under section 300, is binding: see section 309. They also have power to declare which one of the conflicting decisions shall be followed.

But they have no power to pass a rule altering their jurisdiction in direct contradiction to the terms of the Act. Nor have they power to delegate to the clerks the jurisdiction conferred on the judges: *Fellows v. Owners of The "Lord Stanley,"* (1893) 1 Q.B. 98; *Barraclough v. Brown*, (1897) A.C. 615, 624. Nor have they power to pass a rule repugnant to the provisions of this Act: *Irving v. Askew*, L.R. 5 Q.B. 208, *per* Hannen, J., at p. 211; see also *Weatherfield v. Nelson*, L.R. 4 C.P. 571; *R. v. Pawlett*, L.R. 8 Q.B. 491. *R. v. Liverpool (Mayor)*, 18 Q.B.D. 510; *Weatherfield v. Nelson*, 38 L.J.C.P. 220.

Retired Judge.—A retired county judge is a person who has filled the office of judge of a county court, and who at his own request has been relieved from the discharge of his duty, in contradistinction to one who has against his will been dismissed. He may resume legal practice, embark in commercial ventures, take Holy Orders or enter parliament, without losing his status as a retired judge: *Macdonell v. Blake*, 17 A.R. 312.

Regulating Clerks and Bailiffs.—The board has no judicial functions nor disciplinary power over clerks or bailiffs. Its functions are legislative. It has full power to make rules for the guidance of clerks and bailiffs, which rules have the same force, after approval, as a statutory enactment, and the non-compliance with which would render the officer liable to punishment under sections 30 or 31: *McKenzie v. Ryan*, 6 P.R. 323.

The legislature and the board have full control over the fees of officers. The board may even substitute fees fixed by themselves for fees fixed by a statute; in other words, they may virtually repeal a statute.

The board has the most ample powers of altering and amending rules from time to time, and, as there is no fixed date of sitting, a rule may be altered or abrogated, or a new rule made at any time when the necessity for it appears.

The delay which would be necessary if the legislature had not delegated these powers may, therefore, be avoided.

The board also has power to discriminate against city Division Courts in the matter of fees.

The authority of the legislature to delegate these powers is clear: *R. v. Burah*, 3 App. Cas. 889; *Hodge v. Regina*, 9 App. Cas. 117; *Powell v. Apollo Candle Co.*, 10 App. Cas. 282. "Such an authority is ancillary to legislation, and without it an attempt to provide for varying details and machinery to carry them out might become oppressive or absolutely fail:" 9 App. Cas. at p. 132.

Board to
certify
rules to the
High
Court to be
held before
the Judges.

307. The Board of County Judges or any three of them shall, under their hands, certify to the President of the High Court all Rules and Forms made after this Act takes effect, and the said President shall submit the same to the Judges of the High Court, or to any four of them. R.S.O. 1887. c. 51, s. 299.

The legislation of the board must be certified to the President of the High Court of Justice, *i.e.*, that one of the Presidents of the three divisions of that court who is first in order of seniority: R.S.O. c. 51, s. 3, (10).

At least three of the board must certify the rules and forms framed by them, and at least four judges of the High Court must approve of them.

Upon approval, they govern all future procedure and apply equally to pending actions and those commenced after their adoption: *Re McKay v. Martin*, 21 O.R. 104; *Wright v. Hale*, 6 H. & N. 227; *Kimbray v. Draper*, L.R. 3 Q.B. 160; *Scott v. Wye*, 11 P.R. 93. "No person who sues or is sued on a cause of action which existed before the enactment as to procedure, has a vested right to have proceedings regulated by a particular method of procedure which the legislature has thought imperfect and, therefore, has altered:" *per Bowen*, L.J., *Turnbull v. Forman*, 15 Q.B.D. 238.

Such rules
when
approved
of by the
Judges,

308. The Judges of the High Court (of whom the President of one of the Divisions shall be one) may approve of, disallow, or amend any such Rules or Forms. R.S.O. 1887. c. 51, s. 300.

The judges of the High Court have more than a power of assenting or dissenting. They may amend any rule or form framed by the board.

to have
force of a
statute.

309. The Rules and Forms so approved of shall have the same force and effect as if they had been made and included in this Act. R.S.O. 1887, c. 51, s. 301.

The rules and forms have no force till approved. After approval they have the same effect as if enacted by the legislature.

310. The Judges who make any Rules and Forms approved of as aforesaid shall forward copies thereof to the Lieutenant-Governor, and the Lieutenant-Governor shall lay the same before the Legislative Assembly. R.S.O. 1887, c. 51, s. 302.

Board to transmit copies to the Lieutenant-Governor, etc.

The statute is somewhat defective in not providing for a proper promulgation of the rules. The board is merely required to forward copies of its rules and forms to the Lieutenant-Governor. Nothing further need be done by them, and the Lieutenant-Governor's duty ends when he lays the copies received by him before the Legislative Assembly.

That body cannot give effect to the rules, nor can it alter them or prevent their immediate operation. It can only, as one branch of the legislature, pass a bill for effecting any one of these objects, which bill would become effective only on receiving the Lieutenant-Governor's assent and becoming a statute.

Some provision should be adopted for proper publication of the rules. At present it is almost if not quite impossible to verify the correctness of any rule for want of any known place where an official copy can be found.

Forms.—The Interpretation Act enacts: "Where forms are prescribed, slight deviations therefrom not affecting the substance or calculated to mislead, shall not vitiate them;" R.S.O. c. 1, s. 8, s.s. 35; *Jones v. Grace*, 17 O.R. 681. Statutory forms may be divided into four classes: (1) forms made to suit rather the generality of cases than all cases; (2) inserted merely as examples, only to be followed implicitly so far as the circumstances of the case may admit; (3) may be followed or not, and if followed may safely be followed; (4) forms which must be followed. See *Truax v. Dixon*, 17 O.R. 375.

311. The Lieutenant-Governor may, by warrant, direct the Provincial Treasurer to pay, out of the Consolidated Revenue Fund, the contingent expenses connected with the framing, approval and printing of such Rules. R.S.O. 1887, c. 51, s. 303.

Expenses provided for.

312. In any case not expressly provided for by this Act or by existing Rules, or by Rules made under this Act, the County Judges may, in their discretion, adopt and apply the general principles of practice in the High Court to actions and proceedings in the Division Courts; provided that nothing herein contained shall be held to authorize the taxation or allowance of costs to any officer of the court, other than those to be found in the tariff of fees as authorized and allowed by the Board of County Judges, under the provisions of this or any other Act. R.S.O. 1887, c. 51, s. 304.

Practice of the High Court may be followed in unprovided cases.

Practice of the High Court.—It is only in cases not expressly provided for in the statute or rules that the judges may apply the general principles of practice of the High Court: *Clark v. McDonald*, 4 O.R. 310. And only the general principles of practice may be so applied.

Statutory enactments conferring powers upon or prescribing particular procedure for the High Court, cannot be extended under this section to Division Courts. For instance, the provisions of the Consolidated Rules

as to service upon corporations are not applicable to Division Courts: *Ahrens v. McGilligat*, 23 C.P. 171; *Re Guy v. G.T. Ry. Co.*, 10 P.R. 372. Nor are the provisions as to discovery by examination and production of documents: *Re Willing v. Elliott*, 37 U.C.R. 220.

Those rules are rules of procedure applying only to the courts to which they are in terms made applicable: *Bank of Ottawa v. McLaughlin*, 8 A.R. 543; but see *Wood v. Leetham*, 61 L.J.Q.B. where it was said the practice of the High Court is to be followed when not inconsistent. In *Re Jones v. Julian*, 28 O.R. 601, it was said that the practice of the High Court, under this section, is applicable to trial by jury in the Division Court in so far as the right of the judge to submit questions to the jury is concerned.

General principles of practice may be applied, *e.g.*, the Judges may exercise the same discretionary power as to allowing parties to sue *in forma pauperis* which the Judges of the High Court exercise: *Chinn v. Bullen*, 8 C.B. 447.

In the High Court the granting or refusing of security for costs is purely discretionary and a matter of practice and not a rule of law or a decided right: *per Cameron, J.*, *Re Fletcher v. Noble*, 9 P.R. 257; and a Division Court judge may, therefore, adopt the principles of the High Court and order security for costs in proper cases: *Ib.*

The section will also authorize the appointment of a stranger to execute a warrant of execution or commitment against a bailiff, issued out of his own court, notwithstanding that the appointment of bailiffs is by section 28 vested in the Lieutenant-Governor. This is analogous to the appointment of elisors in the High Court where a sheriff and coroner are interested: *Bellamy v. Hoyle*, L.R. 10 Ex. 220; see notes to section 287.

The principles of practice of the High Court as to amendments may be applied to the Division Courts: *Re White v. Galbraith*, 12 P.R. 513.

Perhaps a judge of a Division Court would have power to order a married woman, against whom a judgment had been recovered, to appear and be examined for the purpose of discovering the particulars of her separate estate. This could be done, perhaps, under the inherent power of the court to enforce its own judgments, if not by judgment summons: see Rule 47, Order 25, of the English County Court Rules of 1892: *Aylesford v. Great Western Ry. Co.*, 8 T.L.R. 786; (1892) 2 Q.B. 626; *Metropolitan Loan & Savings Co. v. Mara*, 8 P.R. 355; *Pearson v. Essery*, 12 P.R. 466; *Re Teasdale v. Brady*, 18 P.R. 104; but see *McLeod v. Emigh*, 12 P.R. 450.

The powers conferred upon judges, under the Judicature Act, of setting aside verdicts of juries and entering judgments are not applicable to Division Courts: *Pryor v. City Offices Co.*, 10 Q.B.D. 504; see also *Cowan v. McQuade*, 19 C.L.T. 108; *Macnee v. Ontario Bank*, 3 C.L.T. 360; *Building & Loan Assn. v. Heimrod*, 3 C.L.T. 361; "High Court Practice in Inferior Courts," 3 C.L.T. 374. See also *R. v. Bayley*, 8 Q.B.D. 411; *Re Payne*, 23 Ch. D. 288, as to stay of frivolous and improper actions.

The court in the exercise of its inherent powers can correct an error arising from an accidental slip or omission in its order. *Cousins v. Cronk*, 17 P.R. 348.

SCHEDULE A.

(Section 36.)

COVENANT BY CLERK OR BAILIFF.

Know all men by these presents, that we *J. B.*, Clerk (*or Bailiff as the case may be*) of the Division Court, in the County of *S. S.*, of *(or United Counties)* of the said County of *(Esquire)*, and *P. M.*, of , in

the said County of *(Gentleman)* do hereby jointly and severally for ourselves, and for each of our heirs, executors and administrators, covenant and promise that *J. B.*, Clerk (*or Bailiff*) of the said Division Court shall duly pay over to every person entitled to the same, all such moneys as he shall receive by virtue of the said office of Clerk (*or Bailiff*) and shall and will well and faithfully do and perform the duties imposed upon him as such Clerk (*or Bailiff*) by law, and shall not misconduct himself in the said office to the damage of any person being a party in any legal proceeding; (*in the case of a Clerk's covenant insert*); and shall pay over to any Bailiff or Bailiffs of the Division Courts the fees to which he or they may become entitled under the tariff of fees, unless where the Clerk and the Bailiff otherwise agree in writing); nevertheless, it is hereby declared that no greater sum shall be recovered under this covenant against the several parties hereto than as follows, that is to say:

Against the said <i>J. B.</i> in the whole,	— dollars.
Against the said <i>S. S.</i> in the whole,	— dollars.
Against the said <i>P. M.</i> in the whole,	— dollars.

In Witness Whereof, we have to these presents set our hands and seals, this day of , in the year of Our Lord one thousand eight hundred and

Signed, sealed and delivered, }
in the presence of }

R.S.O. 1887, c. 51, Sched.; 60 V. c. 14, s. 11.

SCHEDULE C.

(Section 46.)

FOREIGN PROCEDURE BOOK.

Division Court of the

No.

PS.

189

Received summons from County of	Division Court, Rec.
Issued summons to Bailiff	Aff.
Summons ret'd. Served the	day of
by	Post.
Ret'd to Clerk of County of	Division Court, Bailiff's fees. Miles. Ser. Att.

57 V. c. 23, Sched. C.

SCHEDULE D.

(Section 230.)

EXECUTION AGAINST LANDS.

In the Division Court of the Count of

Between *A. B.*, Plaintiff,
and
C. D., Defendant.

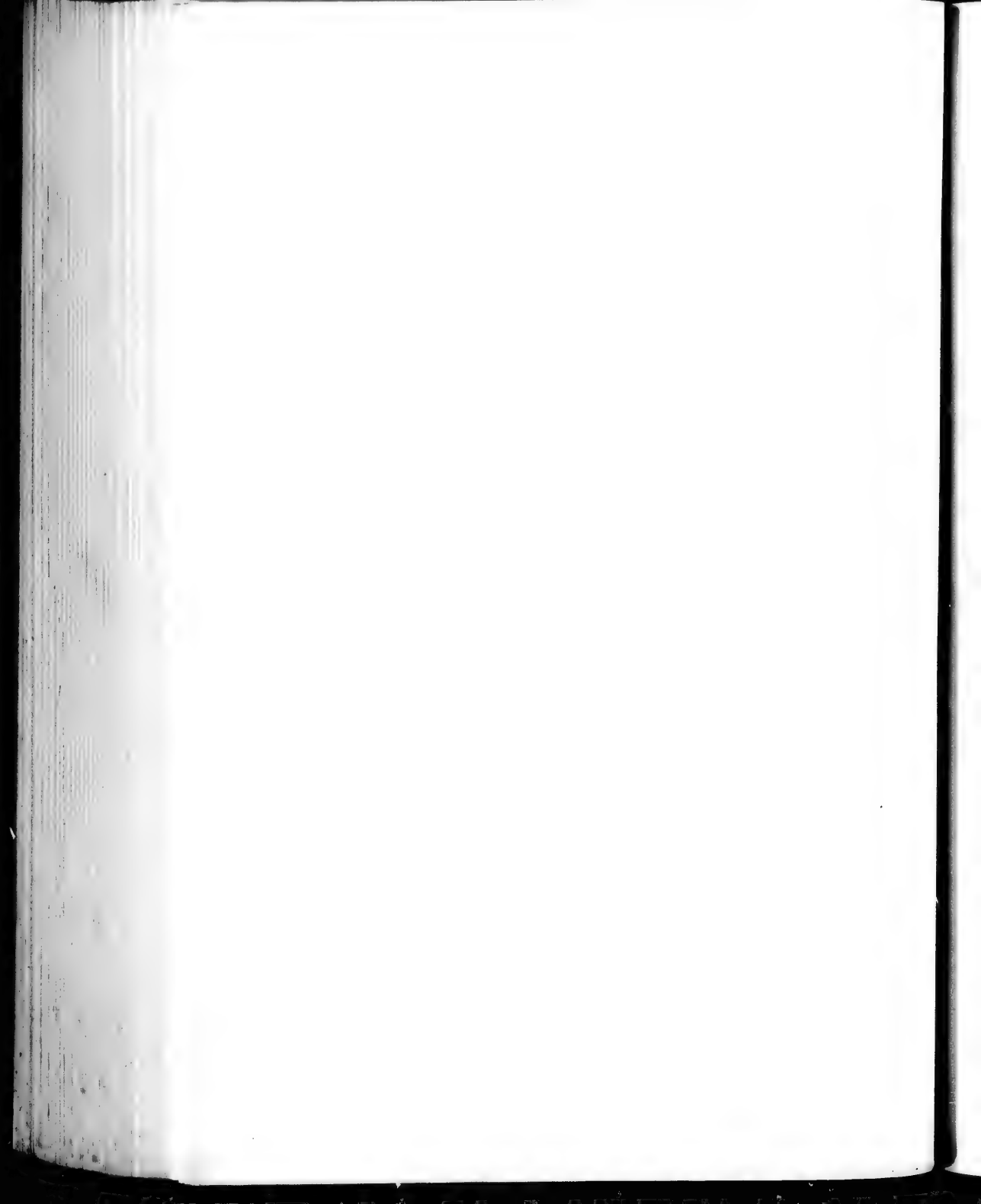
Whereas, on the day of , A.D. 18 , the plaintiff duly recovered in the said Court, held in and for the said Division, judgment against the defendant for \$ for debt, and \$ for costs of suit, which remain unsatisfied (*when judgment has been revived, add, and* on the day of , A.D. 18 , the said judgment was duly revived.) You are hereby required to levy of the lands and tenements of the defendant in the said count , the said moneys, amounting together to the sum of \$ and interest thereon at the rate of six per cent. per annum, from the day of A.D. 18 , together with your own fees, poundage and incidental expenses; so that you may have the same immediately after the execution hereof, and pay the same over to the Clerk of this Court for the plaintiff.

Given under the seal of the Court, this day of , A.D. 18 .

Z. Y.,
Clerk.

To *F. W.*,
Sheriff of the Count of

57 V. c. 23, Sched. D.



DIVISION COURT RULES.

NOTE.—It must be noted that the Rules were framed in 1894 and the numbers of the sections when mentioned therein refer to the Revised Statutes, 1887. The corresponding sections in the last revision will be found by referring to the references at the end of each section.

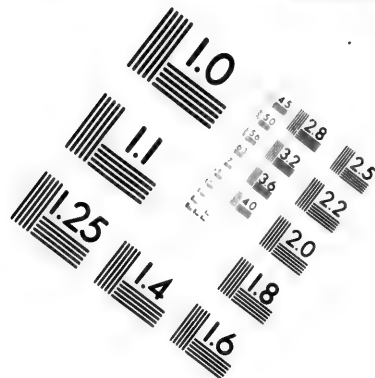
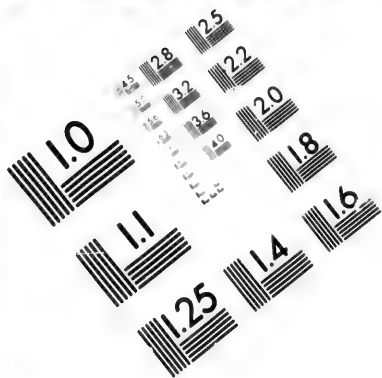
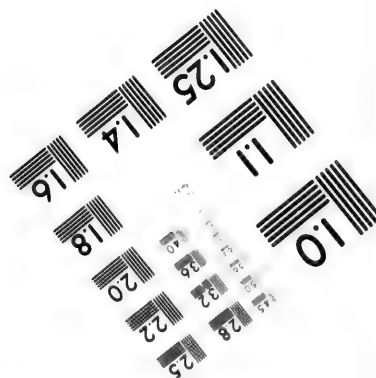
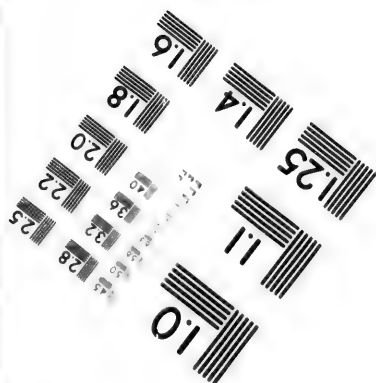
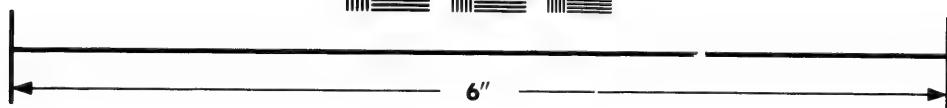
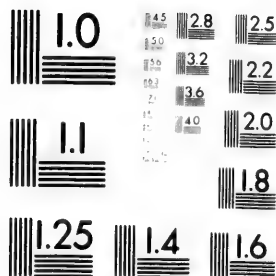


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CERTIFICATE OF ADOPTION OF RULES.

WE, the undersigned, Stephen James Jones, David John Hughes, Edmund John Senkler, Herbert Stone McDonald, and William Warren Dean, being the Board of County Judges appointed and authorized under the 298th section of *The Division Courts Act* to frame General Rules and Forms concerning the practice and proceedings of the Division Courts in the Province of Ontario, and the execution of the process of such Courts; with power also to frame Rules and Orders in relation to the provisions of the said *Division Courts Act*, and of any future or subsequent Act respecting such Courts as to which doubts have arisen, or may arise, or as to which there have been, or may be, conflicting decisions in any of such Courts, have, by virtue of the powers vested in us thereby and of all other powers enabling us in this behalf, framed the following Rules and Orders, and do hereby certify the same under our hands to the President of the High Court, to be by him submitted to the Judges of the High Court, according to law.

Dated this 26th day of January, A.D. 1894.

S. J. JONES,
County Judge, Brant.

D. J. HUGHES,
County Judge, Elgin.

E. J. SENKLER,
County Judge, Lincoln.

H. S. McDONALD,
County Judge, Leeds and Grenville.

W. W. DEAN,
County Judge, Victoria.

Approved, 27th January, 1894.

J. A. BOYD, C.
THOMAS GALT, C.J., C.P.D.
THOMAS FERGUSON, J.
JOHN E. ROSE, J.
HUGH MACMAHON, J.

REVISED RULES, ORDERS AND FORMS

OF THE

DIVISION COURTS

OF THE

PROVINCE OF ONTARIO.

*Adopted by the Board of County Judges on the 26th January, A.D. 1894,
and approved by the Judges of the High Court,
27th January, A.D. 1894.*

RULES.

TIME OF OPERATION.

1. The Rules of practice and the Forms now in use in the several Division Courts shall, on and from the first day of July, A.D. 1894, cease to be used, and in lieu thereof the following shall, on and from such day, be the Rules, Orders, and Forms in force and used in said Courts. But any action, process, order, judgment, or proceeding pending, existing, or in force in any Division Court at that time shall not be thereby affected, but shall continue and remain, and, so far as necessary, be proceeded with under these Rules and Forms, if applicable, or otherwise under the Rules and Forms hitherto in use, or as the Judge may direct. p. 498.

INTERPRETATION.

2. In construing these Rules and Forms, unless otherwise declared or indicated by the context, the following words shall have the several meanings hereby assigned to them over and above their several ordinary meanings, viz.:— p. 149.

(1) The word "Act" shall mean The Division Courts' Act (Revised Statutes of Ontario, chapter 51) and any amending Act or Acts.

(2) The word "party" shall mean a party to a suit or proceeding, and shall include every person served with notice of or attending any proceeding, although not named in the summons or particulars of claim.

(3) The word "person" shall include any body corporate or politic, or party, and the heirs, executors, administrators, or other legal representatives of such person, to whom the context may apply according to law.

(4) The word "executor" shall be held to embrace and mean "of the last will and testament," and shall extend to a party acting as such of his own wrong, and the word "administrator" shall be held to embrace and mean "of the property of," etc. p. 278.

(5) Words importing the singular number, or the masculine gender only, shall include more persons, parties, or things of the same kind than one, and females as well as males, and the converse.

(6) The word "oath" shall be construed as meaning a solemn affirmation, or statutory declaration, whenever the context applies to any

person and case by whom and in which a solemn affirmation or statutory declaration may be made instead of an oath, and in like cases the word "sworn" shall include the words "affirmed" and "declared."

(7) The words "Home Court" and "Home Division" shall mean respectively the Court and Division from which process originally issued.

(8) The words "Foreign Court" and "Foreign Division" shall mean respectively the Court and Division into which process is issued from another Court.

(9) The words "Judge," "Clerk" and "Bailiff" shall be taken to extend and apply to the junior, deputy, or acting Judge, or deputy or acting Clerk, or deputy or acting Bailiff (as the case may be or may require). p. 42.

(10) "Plaintiff" shall include every person asking any relief (otherwise than by way of counterclaim as a defendant) against any other person by any form of proceeding, whether the same be taken by action, suit, petition, motion, summons, or otherwise.

(11) "Petitioner" shall include every person making any application to the Court or Judge either by petition, motion, or summons, otherwise than as against any defendant.

(12) "Defendant" shall include every person served with any writ of summons or process, or served with a notice of or entitled to attend any proceedings. p. 421.

(13) The word "county" shall include two or more counties united for judicial purposes, or for purposes to which an enactment relates.

(14) The words "the claim" shall mean the demand, or the subject-matter for which any suit or proceeding is brought or instituted in a Division Court.

(15) The word "process" shall mean any summons, writ or warrant issued under the seal of the Court, or a Judge's summons or order. p. 2.

(16) "Court" means the Division Court having jurisdiction in the action, matter or proceeding.

(17) "Clear days" means that in all cases in which any particular number of days is prescribed for the doing of any act, or for any other purpose, the same is to be reckoned exclusive both of the first and of the last day. p. 149.

(18) "Judgment" means the final decision of the Court or Judge in any action, or the entering of final judgment by the Clerk, when a claim is not disputed, as provided by section 109 of the Act.

(19) "Order" means the final decision of the Court or Judge in any matter, and also any decision of the Court or Judge other than final in any action or matter.

(20) "Security covenant" means the covenant required to be furnished by a Clerk of Bailiff of a Division Court, in pursuance of any statute requiring security from any such officer. pp. 24, 36, 40.

(21) "Goods, chattels and property" mean goods, chattels, cattle, sheep, or other animals or property, money, money's worth and effects seized or seizable in execution or upon an attachment, or which may be distrained or made exigible to the satisfaction of a judgment in the Division Court.

(22) For the purposes of section 101 of the Act, the word "agent" shall be held to include:

- (a) In case of a railway company, a station-master having charge of a station belonging to the railway company.
- (b) In the case of a telegraph company, a person having charge of a telegraph office belonging to the telegraph company; and

- (c) In the case of an express company, a person having charge of an express office belonging to the express company. pp. 167, 168.

(23) Otherwise than as hereinbefore provided for, *The Interpretation Act of Ontario* and the interpretation clauses of *The Judicature Act* shall apply to these Rules and Forms, unless there be anything on the subject or context repugnant thereto.

- (24) The word "folio" shall mean one hundred words.

CLAIM AND PARTICULARS.

3. Every claim should show the names in full, and the present or last known place of abode of the parties, and must be legible, and delivered to the clerk at his office. But if the plaintiff is not acquainted with the defendant's name in full, he may describe him by his surname, or by his surname and the initial letters of his christian name, or by such name as he is generally known by. The defendant shall, in the process be described as he is in the claim, and such description may be taken to be valid, and all subsequent proceedings may be taken and had in conformity with such description; provided that the judge may, upon application of any party, and upon such terms as he may deem just, make any amendment as to such name or description. pp. 154, 183, 391, 465.

This rule is subject to the provisions of the Act in case of co-partners.

4. The claim shall contain a statement of the particulars thereof, or of the facts constituting the cause of action, and of the sum or sums of money claimed in respect thereof. Such particulars shall be framed in ordinary and concise language. The judge may, on such terms as he may deem just, permit or require such statement to be amended, or further or other particulars to be furnished. pp. 154, 155, 183. Forms 14-18 and 254.

5. In any suit brought under the provisions of the 82nd section of the Act, the claim shall contain a statement (Form No. 17), or to the like effect. pp. 137, 154.

6. In actions in a Division Court, against officers and their sureties, on the officers' security covenant, the claim shall be as in Form No. 18, and the proceedings shall be the same as in ordinary cases. pp. 24, 150, 154. Form 18.

7. Where the excess is abandoned, it shall be done in the first instance, and in the claim. *Where such has not been done, the Judge may, upon such terms as he shall see fit at any time thereafter, but before judgment, permit such abandonment, in which case an entry thereof shall be made in the proceedings.* pp. 90, 124, 154, 448.

PROCESS.

8. All first process, with the exception of warrants of attachment issued by Justices of the Peace, shall be issued under the seal of the Court, be signed by the Clerk, dated the day on which the claim is entered for suit, and numbered to correspond with the claim on which it issues. pp. 2, 13, 442.

9. The first process issued in a suit under the seal of the Court shall, for all purposes, be held to be the commencement of the action. pp. 2, 13, 131.

10. The first process for the recovery of a debt or money demand, or for a tort or other personal action, may be a summons, and called "ordinary summons" (Form 49). pp. 35, 131, 154.

11. In actions for the recovery of a debt or money demand, where the particulars of the plaintiff's claim are given with reasonable certainty and detail, the first process may be a summons (Form No. 47), which shall be called "special summons." pp. 35, 131, 154, 187, 193.

12. Where an *alias* or *pluries* process becomes necessary, it shall be dated on the day on which it actually issued. p. 35.

13. Where the plaintiff sues under the 229th section of the Act, the proceedings may be by "ordinary summons," or "special summons." At the end of the particulars, or in addition to the notices and warnings on the summons, the notices and warnings set forth in Form No. 52 shall be given. pp. 35, 413.

14. Leave to bring an action under the 83rd section of the Act may be granted by the Judge, on production of an affidavit (Form No. 23), and in the summons it shall be stated, "Issued by leave of the Judge." pp. 35, 138.

15. Where there are more defendants than one, and they reside in different counties, concurrent summonses may issue for the service of the defendants residing out of the county in which the action is brought, but the costs only of the summonses actually served shall be allowed on taxation, unless the Judge directs otherwise; and such concurrent summonses shall correspond with the original, and be marked in the margin "Concurrent summons." pp. 35, 154.

SERVICE OF SUMMONS.

16. Every summons shall be returnable on the eleventh day after the day of service thereof upon the defendant, in case the defendant, or one of the defendants, resides in the county in which the action is brought; in case the defendant does not reside, or in case none of the defendants, if there be more than one, reside in the county in which the action is brought, such summons shall be returnable on the sixteenth day after the day of such service. pp. 51, 147, 158, 465.

17. The summons, with a copy of the account or of the particulars of the claim or demand attached, shall be served ten days at least before the return day thereof. pp. 44, 51, 147, 158, 187, 465.

18. In case the defendant does not reside, or in case none of the defendants (if there be more than one) reside in the county in which the action is brought, the summons must be served fifteen days at least before the return day thereof. pp. 44, 51, 147, 156, 158, 187.

19. In case of defendants having different or separate, and not joint, interests in an action, the summons must be served on any defendant residing out of the county in which the action is brought fifteen days at least before the return day thereof. pp. 51, 136, 147, 158, 187.

SUBSTITUTIONAL SERVICE.

20. Where it is made to appear to the Judge upon affidavit that reasonable efforts have been made to effect personal service of the summons upon the defendant, primary debtor, or garnishee, and either that the summons has come to the knowledge of the defendant, primary debtor, or garnishee, or that he wilfully evades service of the same, or has absconded, either before or after the issue of summons, or is out of the Province of Ontario, but having in Ontario an office and an agent doing business on his behalf, the Judge may, by order, grant leave to the plaintiff to serve the summons, in such manner, at such place, or upon such person, for the defendant, primary debtor, or garnishee, as to him

may seem proper, and may grant leave to the plaintiff to proceed as if personal service had been effected, subject to such conditions as the Judge may impose, and in the same order the Judge may direct that all further notices and orders in the suit up to judgment may be served in the same manner as he has directed substitutional service of the summons. Superseded by sec. 104. pp. 98, 163.

21. Every summons issued against a corporation, firm, or individual, not having its chief place of business within the Province, and all subsequent papers and proceedings in the action or proceeding in which the summons has been issued, may be served on the agent of the corporation, firm, or individual, whose office or place of business, as such agent, is either within the division in which the summons issued or is nearest thereto. pp. 147, 167, 187, 193.

22. Under the 83rd section of the Act, the leave to be granted for issuing a summons shall be by the Judge before whom the action is to be tried under the order, but no leave shall be given to bring a suit in a division other than the one adjacent to the division in which the party to be sued resides, but the division may be in the same or an adjoining county. p. 138.

Flooding Lands in Certain Districts.

23. Any action under 52 Vic. cap. 16 (Ontario), for flooding lands, where the sum claimed does not exceed \$20, may be commenced by ordinary summons, and the proceedings thereafter shall be as in any ordinary case. See R.S.O. c. 85. See also appendix.

Notice on Writ as to Change of Venue.

24. The notice required by section 98 of the Act shall be endorsed on the summons and be signed by the Clerk in the words of Form No. 48. pp. 149, 159.

Renewal of Writ.

25. No original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of said date; but if any defendant therein named shall not have been served therewith, the plaintiff may, before the expiration of the twelve months, apply to a Judge for leave to serve the writ after, and notwithstanding the lapse of, the said period. pp. 162, 210, 434, 466. Form 284.

- (a) The Judge, if satisfied that reasonable efforts have been made to serve such defendant, or for other good reason, may order that the service shall be good if made within twelve months from the date of the order, and so from time to time during the currency of the further period allowed. p. 162.
- (b) The writ shall in such case be renewed by being marked with the date of the day, month, and year of such renewal, to be so marked by the Clerk upon delivery to him by the plaintiff, his solicitor or agent, of the Judge's order. p. 162.
- (c) In such case, the original writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action is limited, and for all other purposes, from the date of the original issue of the writ. pp. 162, 210.

Amendments.

26. In case a special summons is issued when an ordinary summons should have been issued, or *vice versa*, the same may be altered or amended by order of the Judge, either before or at the hearing, on such terms as the Judge may direct. pp. 155, 193, 194.

ABSCONDING DEBTORS.

27. In all cases where an attachment shall issue (whether the suit be commenced by attachment in the first instance or not), unless the defendant shall have been personally served, the hearing or trial shall not take place until a month after the seizure under the attachment, unless the Judge shall otherwise order. pp. 90, 270, 449, 450, 454.

28. When several persons sue out warrants of attachment against an absconding, removing, or concealed debtor, each one of such attaching creditors may enter a defence, set-off, or counterclaim, and call and examine and cross-examine witnesses as to any debt or claim proved, or attempted to be proved, against the debtor, or as to such set-off or counterclaim, in the same way and to the same extent as the debtor himself might do, were he personally to appear and defend the suit, on any ground whatever. (Compare Rule 69.) pp. 90, 349, 449, 450.

29. Before issuing an attachment against an absconding, removing, or concealed debtor, it shall be the duty of the Clerk to see that immediately following the statement in the affidavit of the amount due to the attaching creditor the cause and subject of such indebtedness is properly set forth according to Form No. 26. pp. 90, 441, 442.

30. In case several judgments have been recovered against an absconding debtor, it shall not be necessary to issue execution upon each such judgment; but one execution against the property seized upon the attachment shall issue for the sale thereof to satisfy the judgments of those creditors, and enough of such property as shall be sufficient to satisfy the said judgments and costs may be sold thereunder, according to law. (Form No. 132a.) Or if the property has been previously sold as perishable, enough of the proceeds may be applied by the Clerk to satisfy such judgments and costs, without execution. pp. 90, 448, 449.

31. The proceeds of such execution, or of the sale of the property, shall, after deducting all costs, remain in the hands of the Clerk, and be distributed ratably amongst such creditors as are entitled to share therein to the extent of their claims, and the surplus, if any, shall be paid to the person entitled thereto. pp. 90, 449.

- (a) Where the amount levied by the Bailiff, or in the hands of or collected by the Clerk, is not sufficient to pay the execution debts, and satisfy the judgments of all the creditors entitled to share in the distribution, with costs in full, the money shall be applied to the payment, ratably, of such debts and costs of the creditors, after retaining the Bailiff's fees, and after payment in full of the costs taxed, and the costs of the execution, to the creditor at whose instance and under whose attachment or execution the seizure and levy were made. p. 449.
- (b) The Clerk shall, before distributing the money, prepare for examination by the debtor and his creditors a list of the creditors entitled to share in such distribution, with the amount due to each, for principal, interest, and costs, the total amount to be distributed, and the amount going to each according to such ratable distribution. p. 450. Form 311.
- (c) Any party entitled to or interested in any money or debt attached or made, by virtue of an attachment or otherwise, against an absconding debtor, in the hands of the Clerk or Bailiff, who is not satisfied with the proposed plan of distribution thereof by the Clerk, may apply to the Judge for an order to correct or change such distribution. p. 450. Form 289.

- (d) The Clerk shall deliver or send (prepaid and registered), by post, to each creditor, a notice that the said list has been so prepared, and may be examined at his office, at any time within five days from the day of the date of the notice; and that unless within ten days after the day of the date of the notice objection to such a list has been filed with the said Clerk the said list shall be binding upon all parties concerned, unless the judge shall otherwise order. p. 450. Form 312.

INTERPLEADER.

32. When any claim shall be made to or in respect of any goods or chattels, property or security, taken in execution, or attached, under the process of any Division Court, or in respect of the proceeds or value thereof, by any landlord, for rent, or by any person, not being the party against whom such process has issued, and a summons has been issued, on the application of the officer charged with the execution of such process, such summons shall be served, in such time and manner as is directed for service of an ordinary summons to appear. pp. 463, 465.

- (a) If the goods or chattels, property or security, were seized or attached while in possession of the claimant, the case shall proceed as if the attaching creditor were the plaintiff, and the claimant were the defendant. In all other cases, it shall proceed as if the claimant were the plaintiff, and the execution or attaching creditor were the defendant. pp. 463, 464.

33. The claimant shall, within five days after the day of service of the summons upon him, deliver to the Bailiff, or leave at the office of the Clerk of the Court, a particular of any goods or chattels, property or security, alleged to be the property of the claimant, and the grounds of his claim, set forth in ordinary and concise language; or, in case of a claim for rent, the amount thereof, for what period, in respect to what premises the same is claimed to be due, and the terms of holding; and any money paid into Court shall be retained by the Clerk until the claim shall be adjudicated upon; provided that, by consent of all parties, or without such consent, if the Judge shall so direct, an interpleader claim may be tried, although these rules may not have been complied with. pp. 462, 465, 468. Forms 168, 254.

34. In case the claimant shall not have complied with the rule in respect of delivering a particular of his claim, the Judge may, upon such terms as he may direct, allow him to deliver the same. p. 466.

35. Where the claim to any goods or chattels, property or security, taken in execution or attached, or the proceeds or value thereof, shall be dismissed, the costs of the Bailiff shall be allowed to him out of the amount levied, unless the Judge shall otherwise order. p. 462.

- (a) Where, under sub-section 3 of section 269 of the Act, the claimant to goods taken under process claims damages from the creditor or from the Bailiff, for or in respect of the seizure of the property, he shall, in the particulars of his claim to the goods, state the amount he claims for damages, and the grounds upon which he claims such damages. pp. 464, 466. Forms 168 (n), 313.

- (b) Where a creditor claims damages against a Bailiff, arising out of the execution of any process, he shall, five clear days before the day upon which the interpleader is to be tried, deliver to the Bailiff a notice of such claim, stating the grounds and amount of such claim. p. 466. See Forms 167, 314.

- (c) Where a claim for damages, under sub-section 3 of section 269 of the Act, is made against a Bailiff and creditor, or either of them, they, or either of them, may pay into Court money in

full satisfaction of such claim for damages, and such payment into Court shall be made in the same manner and have the same effect, and the parties respectively shall have the same rights and remedies of defence and counterclaim as they would respectively have if the proceeding were an action in which the claimant was plaintiff, and the Bailiff and creditor defendants. pp. 464, 472. Forms 315, 316.

- (d) Interpleader summonses shall be issued by the Clerk, on the application of the Bailiff, and shall be served on the claimant and creditor, or upon any solicitor or agent who acts for claimant or creditor. pp. 463, 465. Forms 165, 167.
- (e) Interpleader summonses shall be issued from the Court from which the process issued, or the Court holden for the division in which the seizure under the process was made, at the option of the Bailiff, and the creditor and claimant shall be summoned to such Court, but subject to the power of the Judge, in his discretion, to change the place of trial. p. 464.
- (f) In every case in which an execution or attachment has been issued to a Bailiff who has seized property as belonging to a judgment or absconding debtor, if the Bailiff finds that there is an incumbrance or lien upon the property, or such a claim made thereto as is provided for in section 269 of the Act, it shall be the duty of the Bailiff forthwith to notify the party who issued the process of such incumbrance, lien or claim; and if the party issuing such process insists upon the Bailiff maintaining such seizure, it shall be incumbent upon him to deposit with the Clerk a sufficient sum of money to indemnify the Clerk and the Bailiff against their costs of an interpleader; and in the event of his neglecting or refusing to do so, the Bailiff may, in his own discretion, abandon the seizure, and the party who issued the process shall be barred, unless the Judge shall otherwise order. p. 466.
- (g) In case the claimant so desires, he may deposit with the Bailiff an amount equal to the value of the property seized or attached, or to the amount for which the seizure or attachment has been made, whichever shall be the lesser sum, to be by such Bailiff paid into Court to abide the decision of the Judge upon such claim, and thereupon the Bailiff shall redeliver the property to the claimant. In case of disagreement as to the value of the property seized or attached, the matter shall be decided by the Clerk or Judge. pp. 467, 468.

36. It shall be lawful for the Judge, upon the application of any party to any action or matter pending in the Court, to make any order for the sale by the Bailiff or by any person named in such order, and in such manner and on such terms as the Judge may think reasonable, of any goods, cattle, property, wares or merchandise which may be of a perishable nature, or which incur charges for food or keeping, or which for any other just and sufficient cause it may be proper to have sold at once. p. 466. Form 291.

37. The claimant of goods, chattels, cattle or property referred to in section 269 of the Act must, in making his claim, if he wishes to prevent a sale thereof, deposit with the Bailiff either the amount of the value of the goods claimed—(such value to be fixed by appraisement, in case of dispute)—to be by such Bailiff paid into Court to abide the final result of the proceedings upon such claim; or the sum which the Bailiff shall be allowed to charge as costs for keeping possession of such goods, chattels, cattle or property, until such decision can be obtained, and, in

default of the claimant so doing, the Bailiff shall sell such goods as if no such claim had been made, and shall pay into Court the proceeds of such sale, to abide the final decision of the matter. pp. 462, 468. Form 233.

REPLEVIN.

38. The Division Courts have jurisdiction in all actions of replevin, in case the value of the goods, or other property or effects distrained, taken or detained, does not exceed the sum of \$60.00, and in case the title to land is not brought in question. p. 91.

WHEN GOODS REPLEVIABLE.

39. Wherever any goods, chattels, deeds, bonds, debentures, promissory notes, bills of exchange, books of account, papers, writings, valuable securities or other personal property or effects, have been wrongfully distrained, under circumstances in which, by the law of England, on the fifth day of December, one thousand eight hundred and fifty-nine, replevin might have been made, the person complaining of such distress as unlawful may obtain a writ of replevin in the manner prescribed by these rules; or in case any such goods, chattels, property or effects have been otherwise wrongfully taken or detained, the owner or other person, or corporation, capable of maintaining an action of trespass or trover for personal property, may bring an action of replevin for the recovery thereof, and for the recovery of damages sustained by reason of such unlawful caption and detention, or of such unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses. p. 91.

40. No party to an action or proceeding in any Division Court shall replevy, or take out of the custody of the Bailiff, or other officer, any personal property seized by him under process against such party. p. 91.

41. In actions of replevin, no other cause of action shall be joined in the summons. pp. 91, 96.

42. The action may be brought in the Division Court for the division within which the defendant or one of the defendants resides, or carries on business, or where the goods, or other property, or effects have been distrained, taken, or detained. pp. 91, 96.

43. No writ of replevin shall issue out of any Division Court:

1. Unless an order is granted for the writ on an affidavit by the person claiming the property, or some other person, showing to the satisfaction of the judge the facts of the wrongful taking or detention which is complained of, as well as the value and description of the property, and that the person claiming it is the owner thereof, or is lawfully entitled to the possession thereof (as the case may be). pp. 91, 95. Form 61.

2. Or unless the person claiming the property, his servant or agent, makes an affidavit, which shall be entitled and filed in the court out of which the writ is to issue, stating:

- (a) That the person claiming the property is the owner thereof, or that he is lawfully entitled to the possession thereof (describing the property in the affidavit);
- (b) The value thereof to the best of his belief;
- (c) That the property was wrongfully taken out of the possession of the claimant, or was fraudulently got out of his possession, within two calendar months next before the making of the affidavit. pp. 91, 95. Form 62.
- (d) That the deponent is advised, and believes that the claimant is entitled to an order for the writ;

- (e) And that there is good reason to apprehend that unless the writ is issued without waiting for an order, the delay would materially prejudice the just rights of the claimant in respect to the property. p. 95.
3. Or (in case the property was distrained for rent or damage feasant) unless the person claiming the property, his servant or agent, makes an affidavit (which shall be entitled, and filed in the Court from which the writ is to issue), stating:
- (a) That the person claiming the property is the owner thereof, or that he is lawfully entitled to the possession thereof (describing the property in the affidavit);
 - (b) The value thereof to the best of his belief;
 - (c) That the property was taken under color of a distress for rent or damage feasant, and in such case the writ shall state that the defendant has taken and unjustly detains the property, under color of a distress for rent, or damage feasant (as the case may be.) pp. 95, 98. Form 61.

44. Where an application for an order is made, the Judge may proceed on the *ex parte* application of the plaintiff, or may direct notice to be served on the defendant to show cause why the writ should not issue, and may, on the *ex parte* application, or on the return of the motion to show cause, grant or refuse the writ, or direct the Bailiff to take a bond in less or more than treble the value of the property, or may direct him to take and detain the property until the further order of the Judge, instead of at once replevying the same to the plaintiff; or may impose any terms or conditions in granting the writ, or in refusing the same, as under the circumstances in evidence appears just. pp. 91, 95, 96.

45. In actions of replevin, the first process shall be a writ of replevin and summons, called "summons in replevin" (Form No. 64). The description and value of the property shall be stated in the writ. pp. 91, 96.

46. On entering a claim in replevin, the plaintiff must specify and describe, in a statement of particulars, the cattle, or the several goods, chattels, or other property, or effects distrained, taken, or detained, and the distress or other taking or detention of which he complains. pp. 91, 97. Form 63.

47. Before the Bailiff acts on the writ, he shall take a bond with sufficient sureties in treble the value of the property to be replevied, as stated in the writ. The bond shall be assignable to the defendant; and the bond and assignment thereof may be in the words, or to the effect, in the Forms Nos. 65 and 66, the condition being varied to correspond with the writ. pp. 96, 101.

48. The bond shall be subject to the provisions of section 8, chapter 11, of the Act passed by the Imperial Parliament in the eighth and ninth years of the reign of His Majesty King William the Third. p. 102. Forms 65, 66.

49. Where a writ of replevin is sued out for any personal property which had not been previously taken out of the plaintiff's possession, and for which the plaintiff might have brought an action of trespass or trover, the defendant shall be entitled, if the plaintiff fails in the action, to be fully indemnified against all damages sustained by the defendant, including any extra costs which he may incur in defending the action; and the bond to be taken by the Bailiff shall be conditioned not only as heretofore required in that behalf, but also to indemnify and save harmless the defendant from all loss and damage which he may sustain by reason of

the seizure, and of any deterioration of the property in the meantime, in the event of its being returned, and all costs, charges, and expenses which the defendant may incur. This rule shall not apply to cases of distress for rent or damage feasant. pp. 91, 99, 100, 104.

50. In case the writ issues without an order, the Bailiff shall take and detain the property and shall not replevy the same to the plaintiff without the order of the Judge in that behalf, but may within fourteen days from the time of his taking the same redeliver it to the defendant, unless in the meantime the plaintiff obtains and serves on the Bailiff an order directing a different disposition of the property; but this rule shall not apply in case of a distress for rent or damage feasant under Rule No. 43, sub-rule 3. pp. 95, 98.

51. In case the property to be replevied, or any part thereof, is secured or concealed in any dwelling house or other building or enclosure of the defendant, or of any other person holding the same for him, and in case the Bailiff publicly demands from the owner and occupant of the premises deliverance of the property to be replevied, and in case the same is not delivered to him within twenty-four hours after such demand, he may, and if necessary shall, break open such house, building or enclosure for the purpose of replevying such property or any part thereof, and shall make replevin according to the writ aforesaid. p. 97.

52. If the property to be replevied, or any part thereof, is concealed either about the person or on the premises of the defendant, or any other person holding the same for him, and in case the Bailiff demands from the defendant or such other person deliverance thereof, and deliverance is neglected or refused, he may, and if necessary shall, search and examine the person and premises of the defendant, or of such other person, for the purpose of replevying such property or any part thereof, and shall make replevin according to the writ. p. 97.

53. The Bailiff shall return the writ at or before the return day thereof, and shall transmit annexed thereto:—

- (a) The names of the sureties in and the date of the bond taken from the plaintiff, and the name or names of the witnesses thereto.
- (b) The place of residence and additions of the sureties.
- (c) The number, quantity, and quality of the articles of property replevied; and in case he has replevied only a portion of the property mentioned in the writ, and cannot replevy the residue by reason of the same having been removed or carried (*eloigned*) out of the county by the defendant, or not being in the possession of the defendant, or of any other person for him, he shall state in his return the articles which he cannot replevy, and the reason why not. p. 98. Form 68.

54. If the Bailiff makes such a return of the property distrained, taken or detained, having been *eloigned*, then upon the filing of such return a writ in *withernam* shall be issued by the Clerk who issued the summons in replevin; and before executing such writ the Bailiff shall take security, as provided by Rule No. 47. p. 99. Form 69.

55. A copy of the writ shall be served on the defendant personally, or, if he cannot be found, by leaving the copy at his usual or last place of abode, with his wife, or some other grown person being a member of his household, or an inmate of the said place of abode. p. 98.

56. The copy of the writ shall not be served upon the defendant until the Bailiff has replevied the property, or some part of it, if he cannot replevy the whole, in consequence of the defendant having

removed or carried (*eloigned*) the same out of the county in which he is Bailiff, or because the same is not in the possession of the defendant, or of any other person for him. p. 98.

57. In case it is shown by affidavit, to the satisfaction of the Judge, that service of the writ cannot be made upon the defendant in any of the modes authorized by the preceding rules, such Judge may grant leave to the plaintiff to serve the writ and statement of particulars in such manner, at such place, or upon such person for the defendant, as to him may seem proper, and may grant leave to the plaintiff to proceed, as if personal service had been effected, subject to such conditions as the Judge may impose. p. 98.

58. In case a writ of replevin is issued, or in case an order is made therefor, the defendant may at any time, or from time to time, on notice to the plaintiff, apply to the Judge on affidavit or otherwise to discharge, vary or modify the writ or order, or to stay proceedings under the writ, or for any other relief, to be specified in the notice, with respect to the return, safety or sale of the property or any part thereof, or otherwise; and the Judge may make such order thereon as, under all the circumstances, best consists with justice between the parties. p. 98.

59. In case the defendant has been duly served with a copy of the writ and statement of particulars, then, unless the defendant has left with the Clerk within eight days after the day of service (where the service is required to be ten days before the return), or within twelve days after the day of service (where the service is required to be fifteen days before the return), a notice in writing that he intends to dispute the claim of the plaintiff, it will be considered that he has no defence, and the plaintiff may proceed in the action in the same manner as if the defendant had appeared and had admitted the plaintiff's right to the possession of the goods, and final judgment may be entered as if by default. But the Judge may, on sufficient grounds shown, and on such terms as to costs and otherwise as he thinks just, let the defendant in to defend. p. 99. Form 124.

60. In case the plaintiff becomes entitled to sign judgment by default, he shall be at liberty to sign final judgment for the sum of two dollars and costs, according to the proper scale, but shall not be entitled to recover a larger sum, except upon an assessment before a judge or jury, or upon filing the written consent of the defendant or his solicitor, and an affidavit verifying the signature to such consent. pp. 99, 221.

61. The defendant may at any time, not less than six days before the day appointed for the trial, pay into Court such sum as he thinks a full satisfaction for the plaintiff's demand, together with the plaintiff's costs up to the time of such payment. pp. 99, 221, 226.

62. In case the defendant in an action of replevin shall pay money and costs into Court, and shall leave with the clerk a consent in writing that the replevin bond be delivered up to be cancelled and an express waiver of all right to the property replevied, and the plaintiff accepts such money, the proceedings in the said action of replevin shall thenceforth cease and be discontinued. p. 99. Form 299.

63. It shall not be necessary to have formal pleadings in replevin actions. p. 92.

64. Either party may require a jury in an action of replevin, where the value of the goods sought to be recovered exceeds \$20. p. 99.

65. Where the distress is for rent, or for any other claim for which a distress may be lawfully taken, and the defendant succeeds in the action, if the defendant shall so require, the Judge shall, if the action has been

tried without a jury, and the jury shall, if the action is tried with a jury, find the value of the goods distrained, and if the value be less than the amount of rent or otherwise of money in arrear, judgment shall be given for the amount of such value; but if the amount of the rent, or such other sum of money in arrear, be less than the value so found, judgment shall be given for the amount of such rent, or other sum of money, and may be enforced in the same manner as any other judgment of the Court. pp. 100, 477. Form 125.

66. Where the distress is for damage feasant and the defendant is entitled to judgment for a return, if the plaintiff shall so require, the Judge shall, if the action is tried without a jury, and the jury shall, if the action is tried with a jury, find the amount of the damage sustained by the defendant, and judgment shall then be given in favor of the defendant, in the alternative for a return, or for the amount of the damage so found. p. 100. Form 126.

67. In all cases of replevin, other than those arising out of a seizure by way of distress, where the defendant justifies the taking and proves his case, the judgment for the defendant shall be for a return of the goods, with or without costs, together with such damages as the defendant shall have sustained, if damages are awarded. p. 100. Form 127.

GARNISHEE PROCEEDINGS.

68. The application, under the 178th section of the Act, may be made to the Judge, *ex parte*, and upon affidavit of the primary creditor, his solicitor, or some other person or persons aware of the facts, respectively, stating that judgment has been recovered, and when, and that it is still unsatisfied, in whole or in part, and to what amount, and that the deponent has reason to believe, and does believe, that some one or more parties (naming them, or stating that he is unable to name them,) is or are within this Province, and is or are indebted to the primary debtor, and stating the nature of the debt sought to be attached, and the amount thereof, if known to the deponent, or that after careful enquiry he has been unable to ascertain the amount thereof. p. 335. Forms 43, 44.

69. Any person, other than the primary creditor, primary debtor, or the garnishee, who wishes to avail himself of the benefit of the first subsection of section 188 of the Act, may apply to the Judge for directions how to proceed. Upon such application, the Judge may, upon such terms as he shall think just, add any one or more persons as a party or parties to the action, either as a primary creditor or intervener, or otherwise as he may determine, and may dispose of all matters in dispute, and make such order or orders as to costs as he might have done if such person or persons had originally been parties to the action. p. 349. Compare rule 28, pp. 449, 450. Form 123.

70. In an action against a primary debtor and a garnishee, in case the primary creditor fails to prove his claim, or is non-suited, or judgment is rendered against him, in favor of the primary debtor, and there is a controversy between the primary debtor and the garnishee, which they both desire to have disposed of, the case shall proceed to its termination as between them, in the same way as if the primary debtor were the plaintiff in an ordinary action, and the garnishee were the defendant, and all the consequences shall follow thereafter, whatever be the state of the cause, as would ordinarily follow, and the same remedies and judgment shall be afforded and rendered in all respects as between them as there would supposing the primary creditor had not been a party to the proceedings. pp. 188, 349. Form 120.

71. Where an exemption from liability to garnishment is claimed, under the 174th and 175th sections of the Act, it shall be necessary for the primary debtor to establish the fact of such exemption. pp. 331, 333.

72. The warning (Form 73a) shall be endorsed on or subjoined to the attaching order issued under section 178, and on the summons referred to in section 181 and section 185, sub-section 1. pp. 334, 338, 340, 344.

73. In case a debt sought to be garnished is for wages or salary, the memorandum required by section 177, showing the residence of the primary debtor and the nature of his occupation in the service of the garnishee, if he is then in such service, and whether the debt alleged or adjudged to be due was or was not incurred for board or lodging, shall be set forth in the statement of the plaintiff's claim, and copies thereof furnished to the Clerk, and endorsed upon or annexed to the summons, as required by the said section 177. p. 334. Forms 71, 256.

74. The service of the summons on the garnishee shall in all cases be made at least ten days before the return thereof, and the service on the primary debtor or debtors, ten or fifteen days (according to the places of residence of the parties to be served), before the return thereof. If the amount of the primary creditor's claim exceeds fifteen dollars, the service shall be personal, unless the Judge order otherwise; if such claim does not exceed fifteen dollars, the service may be personal, or on his wife, or servant, or some grown person being an inmate of the dwelling house or usual place of abode, trading or dealing of the person requiring to be served. pp. 334, 338, 342.

75. The primary debtor shall in all cases, unless service is dispensed with by the Judge, be served with the garnishee summons, and, if not served, the Judge, unless he dispenses with service, may, on such terms as to him may seem meet, adjourn the case until such service be effected. pp. 338, 342.

76. The Judge, in any garnishee proceeding, may order that the service need not be personal, but may be made on any person or persons to be named in the order, or in such other manner as the Judge may direct. pp. 338, 342.

77. Whenever in a proceeding to obtain an attachment of debts, it is claimed that the debt sought to be attached belongs to some third person, or that any third person has a lien or charge upon it, the Judge may order such third person to appear and to state the nature and particulars of his claim upon such debt, and after hearing the allegations of such third person, and of any other person who by the same or any subsequent order is ordered to appear, or in case of such third person not appearing when ordered, the Judge may give such decision between all the parties as he shall consider just, and may bar the claim of such third person, either in whole or in part, or make such other order, as such Judge shall think fit, upon such terms in all cases, with respect to the lien or charge (if any) of such third person, and to costs, as the Judge shall think just and reasonable. p. 350. Forms 121, 123, 149, 150.

78. Where the summons, under section 181, is to be issued from any Court other than that in which the primary creditor has obtained judgment against the primary debtor, a transcript of such judgment shall be filed with the Clerk of such first mentioned Court, previous to the issuing of the summons against the garnishee. pp. 340, 341.

79. No payment made by a garnishee to a primary creditor before judgment given against the primary debtor shall discharge him from his liability, unless an order for such payment has been first obtained from the Judge. pp. 339, 352, 363.

- (a) Where a garnishee pays money into Court, and the primary creditor does not accept in satisfaction of the amount sought to be attached the sum so paid into Court, the money shall not be paid out until after the judgment, and any costs which shall have been awarded to the garnishee shall be deducted therefrom and paid to the garnishee. pp. 339, 352, 363.

80. Where the garnishee shall pay into Court, five clear days before the day appointed for the trial, the amount due from him to the judgment debtor, or an amount equal to the claim of the primary creditor, including costs, he shall not be personally liable for any costs incurred by the primary creditor. pp. 339, 352, 363.

- (a) The Clerk shall forthwith give notice of the payment into Court to the primary creditor, and if he elects to accept the money so paid into Court by the garnishee, and shall send to the Clerk and to the garnishee by post, or leave with the Clerk a written notice stating such acceptance, within forty-eight hours after receipt of the notice of payment into Court, no further proceedings against the garnishee shall be taken in the said suit, and in the event of judgment being given therein in favor of the primary creditor against the primary debtor, the money so paid into Court shall, by order of the Judge, be applied upon such judgment. In case the primary creditor had already obtained judgment against the primary debtor, the said money shall, by order of the Judge, be applied upon the same. pp. 188, 339, 352. Form 195
- (b) Upon the return day, should the amount paid into Court be not accepted, the Judge shall determine as to the liability of the garnishee to pay any further sum on account of the debt claimed to be due from him to the primary debtor, and as to the party by whom the costs of the action, or any part thereof, shall be paid, and make such order as may be in accordance with such determination. pp. 339, 354.
- (c) If the primary creditor shall not send or deliver notice to the Clerk of his acceptance of the money paid into Court, as hereinbefore provided, it shall be considered that he elects not to accept the same, but to proceed for a further sum, and the action shall proceed accordingly. pp. 339, 352.

81. The application under section 195 shall not be made *ex parte*, but must be made upon written notice of motion, or by summons obtained from the Judge, returnable at any time and place the Judge may appoint, and calling upon the garnishee, primary creditor, or such other person or persons as the Judge, in his discretion, shall think fit. If the money has been paid over, the primary creditor or other person may be called upon by the notice of motion or summons to show cause why he should not pay the money to the primary debtor or other person applying. pp. 336, 356.

82. The bond to be given under section 195 shall be executed by the primary creditor, or his agent, with one or more sufficient sureties, and shall be in double the amount of the debt ordered to be paid by the garnishee, and shall be an ordinary bond to the Clerk, by his name of office, conditioned for the repayment of the money in case repayment be ordered, and such bond shall be approved of by the Clerk. p. 357. Form 76.

83. The bond given to the Clerk under section 196 may, by order of the Judge, be assigned by the Clerk to a garnishee, upon its being shown that the condition has been broken, by non-compliance with an order for the repayment into Court of moneys paid in by a garnishee. p. 357. Form 66.

84. If the primary creditor is obliged to issue execution against the garnishee, the cost of such execution and the Bailiff's fees thereon shall be levied of the garnishee. p. 354. Form 148.

85. When the attaching order or garnishee summons issues, the Clerk shall forthwith make an entry thereof in the debt attachment book, and so from time to time shall make an entry of each subsequent proceeding so soon as taken. p. 362. Form 5.

DEFENCES IN GARNISHEE PROCEEDINGS.

86. In cases under the Act, and whether the claim of the primary creditor is or is not a judgment, the primary debtor, the garnishee, and all other parties in any way interested in or to be affected by the proceeding, shall be entitled to set up any defence, as between the primary creditor and the primary debtor, which the latter would be entitled to set up in an ordinary action, and also any such defence as between the garnishee and the primary debtor, and may also show any other just cause why the debt sought to be garnished should not be paid over or applied in or towards the satisfaction of the claim of the primary creditor. pp. 340, 342, 351.

- (a) A primary debtor or garnishee who desires to set up a statutory or other defence, or set-off, or to admit his liability, in whole or in part, for the amount claimed in such action, shall file with the Clerk the particulars of such defence, or set-off, or an admission of the amount due or owing by the primary debtor, or the garnishee, as the case may be, within eight days after service on him of the summons. p. 348. Forms 19-21.
- (b) The Clerk shall forthwith send by mail to each of the said parties to the action a copy of such defence, set-off, or admission. p. 348.
- (c) The primary creditor may file with the Clerk a notice that he admits the defence, or set-off, or accepts the admission of liability as correct. p. 348.
- (d) A copy of the notice shall be sent by the Clerk, by mail, forthwith to the garnishee. p. 348.
- (e) In the absence of any notice of defence, or set-off, from any primary debtor or garnishee, the Judge may, in his discretion, give judgment against such primary debtor or garnishee, subject to the provisions of sub-section (a) (*sic quare* (h)) of this rule. p. 348.
- (f) In the event of the primary creditor failing to file a notice admitting or rejecting such defence, set-off, or admission of liability, the garnishee shall not be bound to attend at the trial, and the sum admitted to be due or owing by the garnishee shall be taken to be the correct amount of his liability, unless the Judge shall otherwise order, in which latter case the garnishee shall be notified by the Clerk, and shall have an opportunity of attending at a subsequent date, and of being heard before judgment is given against him. p. 353.
- (g) The costs of all notices required to be given under section 188 of the Act shall be costs in the cause, and in no case shall be payable by the garnishee, unless specially ordered by the Judge. p. 354.
- (h) If the garnishee or the primary debtor, having been duly served with summons, does not appear on the return of such summons, the Judge may proceed to hear the case and may give judgment against him in his absence, but except where an

admission of liability has been filed as in the preceding part of this rule is provided, no judgment shall be given against any garnishee or primary debtor, either for want of notice of defence, or for default of appearance, without sufficient proof of the debt or amount due or owing by him as required by section 187 of the Act. (See *In re Johnson v. Therien*, 12 P.R. 442.) pp. 338, 343.

- (i) If only some of the parties required to be served are served, the Judge may give the same judgment against those served as in ordinary cases. pp. 348, 357.

All prior to sub-section (h) in this rule is similar to section 193, except the words "subject to the provisions of sub-section (h) of this rule" in sub-section (e).

87. In the proceedings against garnishees under the consolidated rules of practice of the Supreme Court of Judicature for Ontario, rules 940 to 943 inclusive, the forms 173b and 152 may be used; and the same proceedings may be taken in the Division Court against the garnishee as provided in The Division Courts Act and in these rules and forms so far as applicable. pp. 362, 363. Form 70, with form on p. 363 as to denial by garnishee.

88. In cases of attachment issued in garnishee proceedings, under the consolidated rules of practice of the Supreme Court of Judicature and coming within the jurisdiction of the Division Courts; the Clerk of Division Court shall enter all the proceedings (commencing with the order received by him) in the procedure book. pp. 36, 362. Form 5.

PROCEEDINGS BY AND AGAINST EXECUTORS AND ADMINISTRATORS.

89. A party suing an executor or administrator, may charge in the summons (Form 50) that the defendant has had assets, and has wasted them, and he shall state in his particulars the amount of assets alleged to have been left by the deceased, and the manner in which the said assets have been wasted. p. 279. Form 50 with form p. 279.

90. In all cases where the defendant is charged with waste in the summons, if the Judge shall be of opinion that the defendant has wasted the assets, the judgment shall be that the debt, or damages and costs, shall be levied of the goods of the testator (if any), and if not, of the goods of the defendant to an amount not exceeding the amount so wasted; and the non-payment of the amount of the demand immediately, on the Court finding such demand to be correct, and that the defendant is chargeable in respect of assets, shall be conclusive evidence of wasting to the amount with which he is so chargeable. p. 280. Form 113.

91. Where an executor or administrator denies his representative character, or alleges a release to himself of the demand, whether he insists on any other ground of defence or not, and the judgment of the Court is in favor of the plaintiff, it shall be that the amount found to be due, and costs, shall be levied of the goods of the testator, if any, and if not, as to costs, of the goods of the defendant. pp. 181, 280. Form 110.

92. Where an executor or administrator admits his representative character, and only denies the demand, if the plaintiff prove it, the judgment shall be that the demand and costs shall be levied of the goods of the testator, if any, and if not, as to costs, of the goods of the defendant, unless the Judge otherwise orders. pp. 181, 280. Form 110.

93. Where the defendant admits his representative character, but denies the demand, and alleges a total or partial administration of assets, and the plaintiff proves his demand, and the defendant proves the

administration alleged, the judgment shall be, to levy the costs of proving the demand of the goods of the testator, if any, and if not, of the goods of the defendant, unless the Judge otherwise orders; and as to the whole or residue of the demand, judgment of assets when they shall have come into his hands; and the plaintiff shall pay the defendant's costs of proving the administration of assets. pp. 181, 281. Form 109.

94. Where the defendant admits his representative character, but denies the demand, and alleges a total or partial administration of assets, and the plaintiff proves his demand, but the defendant does not prove the administration alleged, the judgment shall be, to levy the amount of the demand, if such amount of assets is shown to have come to the hands of the defendant, or such amount as is shown to have come to them, and costs, of the goods of the testator, if any, and, if not, as to costs of the goods of the defendant; and as to the residue of the demand, if any, judgment of assets when they shall have come into his hands. pp. 181, 281. Form 108.

95. Where the defendant admits his representative character and the plaintiff's demand, but alleges a total or partial administration of the assets, and proves the administration alleged, the judgment shall, in case of total administration, be for assets when they shall have come into his hands, and in case of partial administration for such amount as is shown to be in his hands of the goods of the testator, and as to the residue of the demand for such goods when they shall have come into his hands, and the plaintiff shall pay the defendant's costs of proving the administration of assets, unless the Judge shall otherwise order. pp. 181, 282. Form 107.

96. Where a defendant admits his representative character and the plaintiff's demand, but alleges a total or partial administration of the assets, but does not prove the administration alleged, and has not established any other ground of defence, the judgment shall be, to levy the amount of the demand, if so much assets is shown to have come to the defendant's hands, or so much as is shown to have come to them, and costs, of the goods of the testator, if any, and if not, as to costs, of the goods of the defendant; and as to the residue of the demand, if any, judgment of assets when they shall have come into his hands. pp. 181, 282. Form 106.

97. Where judgment has been given against an executor or administrator, that the amount be levied upon assets of the deceased, when they shall have come into his hands, the plaintiff or his personal representative may issue a summons (Form No. 53), and if it shall appear that assets have come to the hands of the executor or administrator since the judgment, the Judge may order that the debt, damages, and costs be levied of the goods of the testator, if any, and if not, as to the costs, of the goods of the defendant, provided that it shall be competent for the party applying, to charge in the summons that the executor or administrator has wasted the assets of the testator or intestate, in the same manner as in Rule 89, and the provisions of Rule 90, shall apply to such inquiry; and the Judge may, if it appears that the party charged has wasted the assets, direct a levy to be made, as to the debt and costs of the goods of the testator, if any, and if not, of the goods of the defendant. pp. 181, 281, 282, 392. Form 105.

98. Where a defendant admits his representative character and the plaintiff's demand, and that he is chargeable with any sum in respect of assets, he shall pay such sum into Court, subject to the rules relating to payment into Court, in other cases. pp. 181, 226, 282.

99. In actions against executors and administrators, for which provision is not hereinbefore specially made, if the defendant fails as to any

of his defences, the judgment shall be for the plaintiff, as to his costs of disproving such defence, and such costs shall be levied of the goods of the testator, if any, and if not, of the goods of the defendant, unless the Judge otherwise orders. pp. 181, 283.

- (a) In case an executor or administrator pleads his notice to creditors and distribution of assets, he must give notice of such defence, and that there has been a proper audit of the accounts of his administration. pp. 178, 188, 280, 283.

100. In actions by executors or administrators, if the plaintiff fail, the costs shall, unless the Judge shall otherwise order, be awarded in favor of the defendant, and shall be levied of such goods as the Judge shall direct. pp. 155, 178, 179, 180, 283.

- (a) If the plaintiff sues, or the defendant or any of the defendants is sued, in a representative capacity, it shall be stated in the particulars of claim in what capacity the plaintiff sues or the defendant is sued. pp. 179, 279.
- (b) Trustees, executors or administrators may sue and be sued on behalf of, or as representing the property or estate of which they are trustees or representatives, without joining any of the persons beneficially interested in the trust or estate, and shall be considered as representing such persons; but the Judge may, at any stage of the proceedings, order any of such persons to be made parties to the action, either in addition to, or in lieu of, the previously existing parties thereto. pp. 179, 283.
- (c) Claims by or against an executor or administrator, as such, may be joined with claims by or against him personally, provided the last-mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor or administrator. pp. 91, 179, 283.

Defences and Confessions.

101. In any case where no dispute is entered as to a portion of a claim sued in a Division Court, or where a portion of the claim is admitted by the defendant, the plaintiff may, at his option, proceed to judgment and execution for such portion without prejudice to his right to recover for the remainder of the claim. p. 179, 188, 189.

- (a) Where the defendant's notice of defence disputes the claim in part only, or admits a portion of the claim, the Clerk shall forthwith notify the plaintiff thereof in the manner provided by Rule 162, and require him forthwith to state in writing whether he is willing to take judgment for the portion so admitted, or as to which no dispute is made, and unless the plaintiff, within forty-eight hours after the receipt of such notice, notifies the Clerk in writing that he is content to take judgment for such portion, it will be assumed that he intends to proceed for the remainder of the claim, and the case will be entered for trial accordingly. (See *post* Rule 166.) p. 188. Forms 99, 195, 229, 230.

Confession Before Action.

102. Every confession or acknowledgment of debt, taken before suit commenced, must show therein, or by statement thereto attached at the time of the taking thereof, the particulars of the claim, for which it is given, with the same fullness and certainty as would be required in proceedings by "special summons"; and unless application for judgment on such confession be made to the Judge within three calendar months next after the same is taken, or at the sittings of the Court next

after the expiration of such period, no execution shall be issued on the judgment to be rendered, without an affidavit by the plaintiff or his agent, that the sum confessed, or some and what part thereof, remains justly due; and applications for judgment shall be made at a sitting of the Court for the division wherein the confession was taken, or to the Judge, elsewhere. pp. 188, 370, 371, 373. Form 98.

Notice of Admission of Part.

103. With a view to save unnecessary expense in proof, the defendant or plaintiff shall be at liberty to give the opposite party a notice (Form 19), in writing, that he will admit, on the trial of the cause, any part of the claim, counterclaim, or set-off, or any facts which would otherwise require proof; and after such notice given, the plaintiff or defendant shall not be allowed any expense subsequently incurred for the purpose of such proof: the notice shall be served on the plaintiff or defendant, or left at his usual place of abode, or, if he be not resident within the division, be left with the Clerk of the Court for him, at least five days before the day appointed for the trial or hearing. pp. 188, 189.

104. A defendant giving notice of set-off or other statutory defence, or paying money into Court, or pleading a tender or counterclaim, shall be deemed to have sufficiently given the Clerk notice of disputing the plaintiff's claim within the meaning of the 109th section of the Act. pp. 188, 221, 226, 490. Forms 19, 195.

COUNTERCLAIM.

105. A defendant in an action may set up by way of counterclaim, against the claim of the plaintiff, any right or claim whether the same sound in damages or not. p. 110. Form 21.

106. A counterclaim, not involving matter beyond the jurisdiction of the Court, shall have the same effect as a statement of claim in a cross-action, so as to enable the Court to pronounce a final judgment in the same action, both on the original and on the cross-claim. p. 112.

107. Where a defendant sets up a counterclaim, if the plaintiff or any other person named as party to such counterclaim, contends that the claim thereby raised, ought not to be disposed of by way of counterclaim, but in an independent action, he may at any time before or at the sittings, apply to the Judge for an order that such counterclaim may be excluded; and the Judge may, on the hearing of such application, make such order as shall be just. p. 112.

108. In any case of counterclaim, or where any incidental claim arises at the trial, if the Judge thinks that such claim can be better disposed of by an independent action, he may order such claim to be excluded, whether any application for that purpose be made to him or not. p. 112.

109. Where, in any action, a set-off or counterclaim is established against the plaintiff's claim, the Judge may, if the balance is in favor of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case, as provided by sections 74 and 130 of the Act. pp. 112, 113, 244. Forms 85, 86, 136.

110. Where in any action a counterclaim is made, it shall be a matter of discretion for the Judge whether the judgment shall be entered for so much for the plaintiff on the claim, and for so much for the defendant on the counterclaim, or whether it shall be entered for the balance. p. 112. Forms 85, 86, 87.

111. If, in any case in which the defendant sets up a counterclaim or set-off, the action of the plaintiff is stayed, discontinued or dismissed, the counterclaim or set-off may, nevertheless, be proceeded with. p. 110.

112. Where an action is brought, or a defendant in his statement of defence seeks by way of counterclaim, to recover specific property, and the party from whom such recovery is sought does not dispute the title of the party seeking to recover the same, but claims to retain the property by virtue of a lien or otherwise as security for any sum of money, the Judge, upon being satisfied by affidavit or otherwise of the existence of such lien or security, may order that the party seeking to recover the property be at liberty to pay into Court, to abide the event of the action, the amount of money in respect of which the lien or security is claimed, and such further sum (if any) for interests and costs as such Judge may direct, and that upon such payment into Court being made, the property be given up to the party seeking to recover it. pp. 112, 113.

JUDGMENT ON COUNTERCLAIM, WHERE PLAINTIFF DOES NOT APPEAR.

113. If, when a trial is called on, the plaintiff does not appear, and the defendant has given notice of a counterclaim, not involving matter beyond the jurisdiction of the Court, he may prove such counterclaim, so far as the burden of proof lies upon him, and have judgment accordingly; provided that any judgment obtained under this rule may be set aside, upon the application of the plaintiff, in like manner as a judgment obtained under sections 109 or 117 of the Act. pp. 113, 192, 213.

RULE IN CASES OF DEFENCE OR COUNTERCLAIM IN EXCESS OF JURISDICTION.

114. Where, in any proceeding before a Division Court, any defence or counterclaim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counterclaim shall not effect the competence or the duty of the Court to dispose of the whole matter in controversy, so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counterclaim. pp. 112, 115.

115. In case the defendant desires to avail himself of the law of set-off, or counterclaim, or of the Statute of Limitations, or of any defence under any other statute having the force of law in this Province, he shall, not less than six days before the day appointed for the trial, give notice thereof in writing to the plaintiff, or leave the same for him at his usual place of abode, if living within the division, or if living without the division, shall deliver the same to the Clerk of the Court in which the action is to be tried; and in case of set-off or counterclaim he shall deliver to the Clerk a copy of the particulars of such set-off, or counterclaim, to be kept with the papers in the cause, and also a copy for the plaintiff, if his usual place of abode is not within the division; and the Clerk shall forthwith give to such plaintiff a notice of such set-off, or counterclaim, by mailing the same to him in a letter duly registered, addressed to his usual place of abode or business, according to the Form 195, together with one of the copies of the particulars of such set-off or counterclaim; provided that in case of non-compliance with this rule the Judge may, on such terms as he shall think fit, adjourn the trial of the action to enable the defendant to give such notice, or may in his discretion, allow such notice to be given and the trial of the action to proceed at once. pp. 112, 227, 490. Forms 20, 21, 195.

JUDGMENTS AND EXECUTIONS.

Special Summons—Several Defendants.

116. In case there are several defendants, and all of them have not been served with a special summons, then unless the plaintiff is content to take judgment against those served only, judgment cannot be entered by the Clerk on his behalf, but the plaintiff will have to proceed to a hearing before the Judge as in ordinary cases. pp. 178, 189, 213.

117. In case the notice required by the 109th section of the Act has not been given by a sole defendant, or by one or more of several defendants (and the plaintiff is willing to take judgment against those only), and leave to dispute the plaintiff's claim has not been given by the Judge, the Clerk, after receiving a return of the "*special summons*," with the proper affidavit of service, may, on the twelfth day after the service of the summons, where the return day is the eleventh day after service, and on the seventeenth day, where the sixteenth day after the day of service is the return day of such summons, or at any time within one month after such return day, enter judgment against the defendant or defendants so served as aforesaid, for the claim, or so much thereof as has not been disputed, without prejudice to the plaintiff's right to recover for the remainder of the claim. pp. 185, 186, 204, 371, 383.

118. In actions commenced by special summons, where there are more defendants than one, and some of them have been served with process, but have not given notice disputing the plaintiff's claim, and other or others of them have not been served, but have given a confession of the debt, the Clerk shall produce or transmit the confession duly proved to the Judge for his order, and when the Judge's order shall be procured, the Clerk may enter judgment within one month after the return of the summons against all the defendants for the amount claimed in the particulars, provided that the defendants who have confessed shall have acknowledged the same amount by their confession, and such judgment may be in the Form No. 81, and it shall not be in the power of the plaintiff to elect either to proceed on the confession against some of the defendants, or to obtain final judgment against those defendants who have not confessed, but the judgment shall be entered against all the defendants jointly. pp. 189, 370, 383. Form 81.

119. In any action brought by special summons against several defendants, if all the defendants have not been served upon the same day, and no notice of defence has been entered by the defendant or defendants first served, the Clerk may immediately after the expiration of the return day, in the case of each defendant, enter a minute in the procedure book, stating the facts of service and of defence: and if no defence has been entered by any of said defendants, the Clerk may, immediately after the time has expired in which the defendant last served might have entered such defence, sign final judgment against all the defendants. pp. 189, 190.

120. Where there are several defendants in an action commenced by special summons, under section 109 of the Act, and one or more of defendants has or have given notice disputing the claim of the plaintiff, and another or others of them have not given such notice, the plaintiff may have final judgment entered by the Clerk against the latter, and may cause execution to be issued upon such judgment; without prejudice to his right to proceed with his action against such of the defendants as have given notice. pp. 189, 383.

121. Any defendant who has been minuted as aforesaid may be let in to defend by the Judge on sufficient grounds shown. pp. 189, 190.

122. In case the defendant has given a confession or acknowledgment of debt, and has not put in the notice disputing the plaintiff's claim, the plaintiff may either proceed on the confession, as in ordinary cases, or may obtain final judgment under the 109th section of the Act, as he may elect. pp. 189, 371.

123. In case judgment be not entered by default, on a special summons, within one month after the return day thereof, the Clerk shall not enter it afterwards, without an order from the Judge. pp. 113, 195.

(a) When judgment is given against the defendant by the Judge, pursuant to section 110, immediate notice thereof shall be given by the Clerk by letter or postal card, to the defendant. p. 195.

124. Where, under the provisions of the Act, a writ of execution is required to be executed out of the division, but within the county, the writ may be directed by name of office to the Bailiff of any of the Division Courts in the county, but shall not be issued to the Bailiff in another county. The returns required to be made under sections 103 and 104 must be made to the Clerk by whom the process or document has been issued. pp. 169, 170, 386.

JUDGMENTS.

125. Every judgment and order of the Court shall be entered by the Clerk in the procedure book, according to the forms 77 to 131 inclusive, or to the like effect; and when any order is made for the payment of any debt, damages, costs, or other sum of money, the same shall be payable at the office of the Clerk, at the expiration of fifteen days from the rendering of judgment, unless the Judge otherwise orders, but where judgment is signed by the Clerk under sections 109 or 111 of the Act, execution may issue forthwith. pp. 36, 189, 200, 216, 278, 284, 369, 379, 380, 387, 389.

126. After an award has been made, and with an affidavit of the due execution thereof is filed under the Act unless the Judge otherwise orders, the Clerk shall forthwith enter judgment on such award, and shall, at the request of the party entitled thereto, issue execution thereon, at such time and in such manner as upon an ordinary judgment of the Court. p. 369. Form 83.

127. When judgment is given for the defendant on a set-off or counter-claim, he will be entitled to issue execution and to take proceedings as in ordinary cases for the recovery of the balance of his set-off or counter-claim, if such balance does not exceed a sum within the jurisdiction of the Court, or if the defendant files with the Clerk a consent in writing to abandon such excess. pp. 112, 113, 115, 379. Forms 135, 136.

128. Where, under section 147 of the Act, the Judge suspends or stays any judgment, order, or execution, given, made, or issued in the action, and orders the same to be paid by instalments, such instalments shall be payable at such periods as the order directs: and if no period be mentioned, the first shall become due on the 28th day from the day of making the order, and every successive instalment shall become due at a like period of 28 days from the day of the previous instalments becoming due, and such instalments shall be paid to the Clerk of the Court. pp. 284, 291, 427. Form 102.

Judgment where Defence only for Part.

129. Where a motion has been made for judgment, under section 111, and it appears that the defence set up by the defendant applies only to a part of the plaintiff's claim, which is admitted to be due, the Clerk shall,

by the order of the Judge, at the request of the plaintiff, forthwith enter final judgment for such part thereof as the defence does not apply to, or as is admitted to be due. pp. 188, 204. Form 277.

Motion for Judgment.

130. Where the amount of the claim of debt sought to be recovered in an action exceeds \$40, and the Judge has made an order empowering the Clerk to sign final judgment, under section 111 of the Act, execution may be issued thereon, at the instance of the plaintiff, at any time thereafter. pp. 198, 199, 200, 205, 284. Forms 79, 80.

- (a) The application of a plaintiff shall be by notice by the plaintiff, his solicitor or agent, to be served upon the defendant, and no costs in respect of such applications shall be taxed in the cause, except for service when made by the bailiff. p. 198. Form 301.

131. Where final judgment has been signed by the Clerk under section 109, execution may issue forthwith. pp. 189, 284, 380.

132. All executions and warrants shall be printed on half sheets of foolscap paper in order to afford space for the endorsement of a schedule of property seized and other memoranda proper for the Bailiff to enter thereon. pp. 37, 382.

THE CREDITORS' RELIEF ACT.

133. Where any Division Court judgment or execution has been, or shall hereafter be filed with any Sheriff under the Creditors' Relief Act, or a certificate for any claim within the jurisdiction of the Division Court, and the same is not paid in full, and the Sheriff is unable to make the money thereon, the creditor may obtain a return thereof from the Sheriff according to the facts, and file the same with the Clerk of the Division Court, in which the judgment was recovered, or in the place where the cause of action arose, or the debtor (or one of the debtors, if more than one) resided, and the clerk of the Division Court shall enter the same in the procedure book of the Court, and it shall thereupon become a judgment of the said Court, for the unpaid balance due thereon, as appearing by the Sheriff's return, and the claim may be enforced in the same manner as any other judgment of the Division Court. pp. 390, 411. Forms 95, 96.

- (a) Where a claim is not paid in full, and the Sheriff's return under the Creditors' Relief Act relates to a judgment or execution of the Division Court, and is filed with the Clerk of the Court in which the judgment was recovered, or from which the execution issued, the Clerk shall make an entry in the procedure book at the place where the judgment has been so entered and the effect of the Sheriff's return shall therein be set forth (Form 95), and if the Sheriff's return shows a part satisfaction of the judgment or execution, the same shall be so stated, and the judgment against the judgment debtor shall stand only thereafter for the residue of the debt or damages, interest and costs. p. 390.
- (b) Where the Sheriff's return relates to a certificate for a claim within the jurisdiction of the Division Court that has not been paid in full, and such certificate is filed with the Clerk of the Division Court in the division where the cause of action arose, or wherein the debtor (or one of the debtors if more than one) resided, the Clerk of such Court shall enter the same in the procedure book, as a judgment of such Court (Form 96), for the unpaid balance due thereon, as appears by such return, and shall take proceedings thereon, as upon any other judgment of such Court. p. 390.

134. After a transcript of judgment has been issued from the Home Court to a Foreign Court or to a County Court, the Clerk of the Home Court has no further right to deal with the case, as his functions have ceased therein (except by order of the Judge or under the provision of 52 Viet., c. 12, s. 24), and he cannot, either as agent for the judgment creditor, or otherwise, order, in the name of such judgment creditor, or of any one else, that the money made or paid thereon shall be transmitted to himself or to any other person. p. 389. Transcripts to the County Court are abolished: p. 395.

(a) When, upon the application of any plaintiff or defendant having an unsatisfied judgment in his favor, a transcript of the entry of such judgment, under section 217, or a transcript of the judgment under section 223 of the Act is issued from the Court in which the judgment has been recovered, an entry thereof shall be made by the Clerk in the procedure book, and no further proceedings shall be had in the said Court upon any such judgment, without an order from the Judge, except as provided by section 217 of the Act, as amended by section 24 of 52 Viet., c. 12: in the case of a judgment of which a transcript has been issued to another Division Court. pp. 388, 389. Form 39.

(b) Every transcript of a judgment shall be prepared by the Clerk upon a full sheet of foolscap paper, carefully written in a plain hand, or printed without contraction of words or figures, and shall be according to the Forms 164, 164a, or 164b, and if a judgment has been revived, the order of revival or its purport shall be set forth therein. p. 388. Form 164a is now obsolete: pp. 394, 395.

135. No transcript or copy of a judgment shall be issued or acted upon, under the 215th or 217th section of the Act, where the proceedings have abated, or in a case where no warrant of execution or judgment summons shall have issued on a judgment more than six years old, unless such judgment shall have been revived. p. 389.

136. In cases that have been brought to trial, the Clerk shall not issue any transcript of a judgment until after the lapse of fourteen days from the trial, except upon the order of the Judge. p. 389.

137. The entries of proceedings on a transcript under the 217th section of the Act, may be made in the procedure book of the Court to which it has been sent, in the form of an ordinary suit, as near as may be. And the procedure book shall, for that purpose, be the transcript of judgment book required by the Act. p. 389.

138. All special judgments or orders shall be prepared by the Clerk, or such other person as the Judge shall direct. Either party dissatisfied with the judgment or order as so prepared may apply to the Judge by motion to vary and finally settle the same; but, except by leave of the Judge, such notice shall not operate as a stay of proceedings. The judgment or order, when finally settled, shall be filed, and a minute of such filing, with the date thereof, shall be entered in the procedure book. p. 277.

Reviving Judgments, Etc.

139. During the lives of the parties of a judgment, or of any of them, execution or other process may be issued at any time within six years from the recovery of the judgment. pp. 5, 297, 391, 392.

140. In the following cases:—

- (a) Where any change has taken place after judgment by death or otherwise, of the parties entitled or liable to execution.
- (b) Where a husband is entitled, or liable to execution upon a judgment or order, for or against his wife.

- (c) Where a party is entitled to execution upon a judgment of assets in future.
- (d) Where a party is entitled to execution against any of the shareholders of a joint stock company upon a judgment recovered against such company, or against a public officer or other persons representing such company.

The party alleging himself to be entitled to execution must apply on affidavit to the Judge for leave to issue execution accordingly. And such Judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties, shall be tried in any of the ways in which any question in any action may be tried; and in either case such Judge may impose such terms as to costs or otherwise as shall be just. No order to issue execution shall be made under this rule *ex parte*, but only after at least three days' notice to the party against whom it is sought to issue execution, unless under special circumstances the Judge shall otherwise order. pp. 5, 114, 181, 391, 392, 414. Forms of Affidavit, see Forms 36-38. Forms of Order, Forms 218, 219, 294. Entry in Procedure Book, Forms 103, 104. Forms of Execution, 139, 140. See Rule 230.

141. No execution or other process shall, without leave of the Judge, issue on a judgment more than six years old, unless some payment has been made thereon within twelve months previously; but no notice to the debtor, before applying for such leave, shall be necessary, and such leave shall be expressed on the execution or warrant, or summons in the words, *Issued by leave of the Judge.*" pp. 4, 5, 391, 393, 421.

142. The renewal of all writs of execution may be made from time to time, before the expiration thereof, by the Clerk of the Court issuing the same, by marking on the margin of the writ a memorandum to the following effect: "Renewed for six months from the date thereof."

Dated day of 18 X.Y., Clerk. p. 393.

143. Where one or more of several plaintiffs or defendants shall die after judgment, proceedings to enforce the same may be taken by the survivors or survivor, or against the survivors or survivor, without leave of the Judge. pp. 391, 392.

Cross-Judgments to be Set off.

144. In case there are cross-judgments between the parties to an action, the Judge, on the application of either party, may, by order direct the Clerk to make an entry thereof in the procedure book, and that the party only, who has obtained judgment for the larger sum shall have execution, and the Clerk shall (if required) issue execution thereon in the ordinary form, for the balance over the smaller judgment; and he shall enter satisfaction on the judgment for the smaller sum. If both sums are equal, satisfaction shall be ordered to be entered upon both judgments. (See Forms 223-226 inclusive.) pp. 36, 385.

CLERKS' AND BAILIFFS' DUTIES.

145. The Clerk of every Division Court shall have an office at such place, within the Division for which he is Clerk, as the Judge shall direct. p. 5.

146. The following books shall be kept by the Clerk, and the necessary entries fairly made therein, namely:—1st, a book to be called the "Procedure Book," in which shall be entered a note of all process issued, and of all orders, judgments, transcripts received, warrants, executions

and returns thereto, and of all other proceedings, in every cause, and at every Court; 2nd, a book to be called the "Cash Book," in which shall be entered, from day to day, an account of all suitors' moneys paid into and out of Court; 3rd, a "Debt Attachment Book"; 4th, a "Clerk's Fee Book," for the purposes set forth in section 68 of the Act; 5th, the "Judgment Debtor's Book," provided for by Rule No. 201; and 6th, the "Order Book," required by sub-rule (a) to this rule, which books shall be according to the Forms Nos. 4, 5, 6, 7, 8, and 9, and shall be kept, as nearly as may be, in the manner shown therein, respectively.

- (a) The said order book shall be a book in which all orders for the issuing of process or alias or subsequent summonses, and executions and other documents requiring duties to be performed by the Clerk, from day to day, shall be entered and dated as they occur, and signed by the party requiring the same, or his solicitor or agent. pp. 35, 36, 37, 38, 52, 56.

147. After the books which shall be in use, when these rules come into effect, shall have been filled up, the Clerks of the respective Courts shall keep procedure books in the Form No. 4 following and make entries therein according to these rules. pp. 36, 37, 43, 52, 389.

- (a) At the beginning of each such book shall be printed and ruled a page of specimen entries, which shall be taken as suggestive for form of entry therein, according to the nature of the proceeding, as shown by Form No. 4. Entries in the procedure book are to be under and subject to the direction of the Judge, in all cases.
- (b) At the commencement of each procedure book is to be an alphabetical index bound up within the book.
- (c) The index of the procedure book is to be ruled and lettered the same as ordinary commercial ledger indexes, suited to the size of such book.
- (d) The entries in the said index shall first set forth the names of the parties, defendants, or primary debtors, or garnishees, as the case requires, or of persons or corporations against whom suits or proceedings are taken; and, next, the names of the parties, plaintiffs, or primary creditors, or of persons or corporations at whose suit such proceedings are taken or adopted; and are to be made immediately after each suit or proceeding is entered. The page of such entry shall be properly inserted in the index after the names of the parties, and the year number of the suit, thus:

Under the letters MeC.	Year No.	McCrimmon,	ats.	Jayland
	17, 1891	Deft.		Plff.
				Page 317.

(In this case, Jayland being the plaintiff, and McCrimmon the defendant, and the letters "ats," meaning *at the suit of*.)

Under the letter J.	Year No.	Jamison,	ats.	McDonald,
	18	Primary debtor.		Primary creditor.
				Page 76.

Under the letter G.	Year No.	Gough,	sts.	Pierson,
	19	Garnishee.		Primary creditor.
				Page 77.

- (e) Every Bailiff shall keep a separate book, "Fee Book," in which he shall enter, from day to day, all fees, charges and emoluments received by him by virtue of his office, as required by section 68 of the Act, and which shall be according to the Form No. 12. pp. 43, 52, 56. Form 125.

- (f) On the 15th day of January in every year, he shall make up to and including the 31st day of December of the previous year, a return to the inspector, under oath showing the aggregate amount of fees, charges and emoluments so received by him by virtue of his office, and which he has become entitled to receive and has not received during the year. pp. 43, 55, 56.
- (g) In the return made by the Clerk shall be shown the actual amount of the disbursements during the same year in connection with his office. p. 55.
- (h) Every Clerk of a Division Court for a division embracing a city, or part of a city, shall keep a separate book, in which he shall enter from day to day all fees, charges and emoluments received by him by virtue of his office, showing the sums received by him for fees, charges, and emoluments of all kinds whatsoever; and shall, on the 15th day of January in each year, make up to and including the 31st day of December in the previous year a return to the Lieutenant-Governor, under oath, of such fees, charges and emoluments so received by him during the said year. pp. 37, 55, 56, 57.
- (i) Every Clerk shall, on or before the 15th day of January in each year, make a return of the business of his office, for the year ending the 31st day of December preceeding, in such manner as the Lieutenant-Governor shall direct. pp. 55, 57.

148. The Clerk shall number every claim in the order in which it is received by him: the numbering to show the standing of the suit, in respect to the whole number of suits entered in the Court for the then current year. p. 35.

149. In any case where the proceeding by special summons is warranted, it shall be adopted by the Clerk, unless otherwise ordered by the plaintiff. p. 154, 194.

- (a) Where a plaintiff orders an ordinary summons to be issued for a claim for which a special summons would be warranted, and no notice of defence is entered, and the case comes to Court, no more costs shall be allowed the plaintiff than would be taxed upon a judgment by default on special summons. p. 155.

150. The Clerk shall annex to every summons the copy of claim entered with him, according to section 95 of the Act; and to each copy of summons to be served shall be likewise annexed a copy of such claim; and it shall be deemed a part of the summons. pp. 158, 187.

151. The Clerk shall enter in the procedure book the full amount of moneys returned by the Bailiff with an execution, and shall show therein the amount which he has taxed and paid the Bailiff as his fees for executing the same. p. 36.

152. All the papers in the cause received or filed by the Clerk shall be kept by him together in the original summons, and be produced by the Clerk at the hearing of the cause, or when required on application to the Judge. The original summons, in all cases, shall be printed on a half-sheet of foolscap, in order that the papers may be kept therein. p. 35.

153. Every Clerk, upon being furnished with the necessary postage or post card, is expected and enjoined to answer promptly all reasonable inquiries made touching suits by the parties thereto, their solicitors or agents. p. 169.

THE TRIAL LIST.

Service of Subpœna in Foreign Division.

154. The Clerk of any Division Court shall, when required, forward all summonses to the Clerk of any other Division Court in the same or any other county for service, and the Clerk of such other Division Court who shall receive any summons sent to him, by the Clerk of another Division Court, shall hand the same to the Bailiff for service, and when returned shall receive the same from the Bailiff, and prepare the necessary affidavit of service, and upon payment of his fees and fees for such service, shall return it to the Clerk from whom he received it, with the necessary affidavit verifying the service and mileage.

- (a) Every Clerk receiving such summons for service shall enter all such proceedings in a book, to be called the foreign summons book (Form No. 10), to be kept by him for the purpose of recording the same.
- (b) No Clerk or Bailiff is authorized to receive money from a defendant or primary debtor or garnishee upon a claim or suit where the summons is merely forwarded for service, or served under this rule, either as agent for the party, or as Clerk or Bailiff of the Court, or otherwise. This rule shall not be held to apply in the case of a Clerk or Bailiff who is postmaster receiving and transmitting money by means of postal money order, under regulations of the Post Office Department. pp. 39, 51, 158, 169, 170. See Rules 198, 199.

155. The Clerk shall, for each sitting of the Court, prepare three lists, viz., a Jury list, in which he shall enter all cases to be tried by a jury; a Judge's list, in which he shall enter all cases to be tried by the Judge alone; and a Judgment Debtor's list, in which he shall enter all cases in which the judgment debtor has been summoned for examination under section 235.

- (a) In the Jury list and Judge's list, respectively, all causes in which the sum sought to be recovered does not exceed \$100 shall be entered first; and subsequently all causes in which the sum exceeds \$100, and subject to this provision, causes shall be entered in the Jury list and Judge's list, respectively, in the order in which they were in the first instance entered with the Clerk; and in the Judgment Debtors' list, they shall be entered in the order in which the summonses for examination were issued.
- (b) All interpleader issues, in which the money claimed, or the value of the goods or chattels claimed, or of the proceeds thereof exceeds \$100, or where the damages claimed by either party against the other or against the Bailiff exceed the sum of \$60, shall be entered among the causes in which the sum sought to be recovered exceeds \$100.
- (c) Nothing in this rule provided shall interfere with the discretion of the judge to dispose of the causes at any such sitting of the Court in the order that may seem most convenient to him.
- (d) The lists shall be divided into and ruled with the following six headings, viz.:—

- 1st. The number on the list (to be stated consecutively).
- 2nd. The year, number of the summons.
- 3rd. The style of the cause.

- 4th. The nature of the subject of the action, whether on contract or for tort, or in replevin, or an interpleader, or a judgment summons, etc.
- 5th. The amount claimed (if any).
- 6th. The judgment, or order, or disposition made of the cause by the Judge. pp. 149, 207, 210, 211.

Trial by Jury.

156.—In case any party has required a jury to be summoned to attend any sitting of the Court, the Clerk shall issue a summons and also twelve copies thereof for service on the jurors, and shall deliver them to the Bailiff for service. Upon the return of the original summons by the Bailiff, the Clerk shall prepare an affidavit of service and of the mileage necessarily incurred to effect such service, which affidavit shall be sworn by the Bailiff. pp. 90, 311. Form 57. Form 28.

Proceedings in Transferred Cases.

157.—The Clerk, upon receiving the papers and proceedings in any action transferred to the Court of his division under section 87 of the Act, shall at once enter the proceedings in his procedure book, and number the action in the regular order as if it were a new action commenced on the day he received said papers and proceedings, and shall place the action on the list for trial, and take all further proceedings in the action, in the manner directed by section 87. pp. 38, 149, 207.

158. After receiving the papers he shall forthwith notify the parties or their agents by mailing them registered notices informing them of the date, hour, and place of the sittings at which such case is to be tried. p. 149. Form 200.

159. The Clerk of the Court who issued the summons shall certify to the Court to which the case is transferred, in detail, all the costs incurred in the suit up to the date of transfer, inclusive. p. 149.

160. When final judgment is entered by the Clerk, the Clerk is to file the summons and particulars of claim, with the affidavit of the due service of both. pp. 149, 193.

POSTPONED JUDGMENT.

161. In case the Judge shall at the trial postpone pronouncing his decision, and shall either omit to name a subsequent day and hour for the delivery thereof in writing at the Clerk's office, as provided by section 144, or, having named such day and hour, shall omit to give his decision thereat and shall not have duly extended the time for giving the same, his decision may subsequently be given by him at any regular sittings of the Court, or in writing at the Clerk's office upon a day and hour to be fixed by the Judge: provided that written notice of his intention to do so shall have been sent to the parties, or their solicitors or agents by registered letter, at least ten days prior to said sittings, or to the day so fixed by the Judge, either by the Judge or by the Clerk of the Court; such letters to be addressed to them at the addresses given by them in pursuance of Rule No. 241: if such address have been given; and if not, then at their last known place of abode. pp. 272, 273. Form 202.

162. In case the defendant shall have given the Clerk notice that he disputes the plaintiff's claim, or any other notice of which the plaintiff should be informed before the trial, or if the defendant has given a confession, or failed to give notice of defence when required, the Clerk shall immediately send the plaintiff notice thereof. pp. 47, 188. Forms 195, 202. See also Rule 168.

163. The Clerk of every Division Court shall, immediately after the receipt of any sum of money for any party to an action, forward through the post office, to the party entitled to receive the same, a notice, enclosed in an envelope, addressed to such party, or, in case of a transcript of judgment from another Court, then to the Clerk who issued the same, at his proper post office address, informing him of the receipt of the money. The notice thus sent shall be prepaid and registered, and the Clerk shall obtain and file among the papers in the action the post office certificate of the registration, and shall be at liberty to deduct the postage and charge for registration from the moneys in his hands, but he shall charge no fee for the notice. The absence from among the papers in the action of the certificate of registration shall be *prima facie* evidence against the Clerk that the notice has not been forwarded. pp. 38, 389, 496. See Form on p. 496.

164. The Clerk and Bailiff of the Court shall not upon any pretence whatever withhold any moneys received for suitors, on the ground that any Clerk or Bailiff may be indebted to the officer holding such money either for fees or costs or otherwise; but all such moneys, when received or collected, shall at once be duly paid over to the order of the party entitled to the same without reference to such accounts. pp. 25, 36, 38, 48, 49, 389, 417, 497.

165. Where money is received by the Clerk on a suit entered by a solicitor or agent who has paid the deposit, or is responsible for costs to the clerk, such money shall not without notice to the solicitor or agent be paid out to the person beneficially interested therein, unless upon the order of the Judge. pp. 38, 170, 389, 497.

NOTICE TO DEFENDANT OF PLAINTIFF PROCEEDING FOR REMAINDER OF CLAIM.

166. In case the plaintiff has signified in writing his intention to proceed for the remainder of the demand claimed, the Clerk shall notify the defendant, by post, or by sending notice to his usual place of abode or business, and the notice shall state when and where the case is to be tried. pp. 113, 188. Form 201.

NOTICE, ON LEAVE GRANTED TO DEFEND.

167. When the Judge has, by order, granted leave to a defendant to dispute the plaintiff's claim, and the defendant has left with the Clerk the requisite notice, as provided by section 112 of the Act, the Clerk shall send to the plaintiff, his solicitor or agent, notice of such order, specifying at what sittings of the Court the case will be tried. pp. 206, 207. Form 198. See also Rules 121, 277.

168. In any case in which the defendant, primary debtor, or garnishee, or a third party claimant in a garnishee proceeding, or any other person intervening or claiming any interest in the suit, has given the Clerk notice that he disputes the claim of the plaintiff or primary creditor, or any other notice of which the plaintiff or primary or attaching creditor should be informed before the trial, or in any case in which it has become the duty of the Clerk to give notice to any party to a cause of any defence, admission, Judge's order or other matter, of which he should be notified before the trial, such notice must show the place and time of the sittings of the Court at which the cause is to be heard. pp. 188, 206, 226. Form 201. See also Rule 162.

169. When any notice required to be given to any of the parties to a suit is sent through the post office, the Clerk shall register the letter containing such notice, and shall obtain and preserve with the other papers in the suit a certificate of such registration. pp. 149, 169, 181, 188, 206, 207, 290. See Rule 123a.

Tender.

170. When a defendant pays money into Court, in part payment of the amount claimed (section 125), or in order that he may rely on the defence of tender (section 122), and the plaintiff does not accept in satisfaction of the action the sum so paid into Court, the money shall not be paid out until after the judgment, and any costs which shall have been awarded to the defendant shall be deducted therefrom and paid to the defendant. pp. 221-225, and 495.

Tender or Payment of Money into Court.

171. In case a defendant pays into Court a sum of money in full satisfaction of plaintiff's demand, together with costs, under section 125 of the Act, or pleads a tender before action brought and pays money into Court, under section 122 of the Act, the Clerk shall give to the plaintiff or his agent notice thereof forthwith by post (on receiving the necessary postage), or shall send the same to his usual place of abode or business. pp. 221, 222, 226, 495. See also secs. 128, 132. Form 195.

Application for New Trial.

172. In the event of an application for a new trial, in a case in which the sum sought to be recovered exceeds \$100, if the evidence has been taken down in writing, the Clerk shall forward the same with such application and for the purposes thereof. pp. 189, 285. See also sec. 121, p. 210, and sec. 161, p. 307.

173. Upon application for a new trial, when either party appeals and leaves papers requiring service upon the opposite party with the Clerk or at his office, under section 150, the Clerk shall forthwith mail, by registered letter, all such papers to the person or party entitled to the same, or his solicitor or agent, upon payment of the postage and his fees for transmitting. pp. 285, 302.

Taxation of Costs.

174. In every case the Clerk shall make out a bill of costs in detail, and the same may be endorsed upon or annexed to the original summons and may be in the form shown No.

(a) Where practicable, the costs of an action or matter shall be taxed by the Clerk on the day on which the action or matter is tried or heard, and every taxation shall be subject to revision by the Judge or acting Judge. pp. 37, 373, 451.

175. On payment of a fee of ten cents, every Clerk, when required by parties paying costs, shall give a statement in writing of items of all costs, including Bailiff's fees in detail, and upon being furnished with the necessary postage or post card, transmit the same by post. pp. 37, 373.

Returns.

176. The Clerk shall, on the 15th day of January in every year, make up to and including the 31st day of December of the previous year, a return to the inspector, under oath (on forms to be furnished to him), showing the aggregate amount of fees, charges, and emoluments received by him, and which he has become entitled to receive, and has not received, during the year. pp. 55, 57.

177. He shall transmit to the Treasurer of the Province, on the 15th day of January in every year, a duplicate of the said return, and shall also pay to such Treasurer, for the use of the Province, such proportion of the fees and emoluments earned by him during the preceding year as under the Division Courts Act (section 59) he is not entitled to retain to his own use. pp. 55, 57.

178. The list of unclaimed moneys, required by the 49th section of the Act, shall be made under oath, according to the Form No. 221, and shall, in the month of January in each year, be transmitted by the Clerk, together with the moneys (if any) therein mentioned, to the County Crown Attorney, and, if no money remains unclaimed, the fact shall be stated in the affidavit. pp. 40, 498.

179. At the opening of every Court, and at such other times as the Judge shall require, the Clerk shall lay before the Judge the returns of Bailiffs, under Rule 193, duly certified under Rule 194. (See Form 239). p. 44.

180. The Clerk shall, at every sitting of the Court, report in writing to the Judge as to the several sureties of himself and Bailiff or Bailiffs of his Court, showing whether any of them have died, become insolvent, or left the county since his last report, and mentioning any facts connected therewith which ought to be made known to the Judge. pp. 24, 32.

181. Every Division Court Clerk shall make a return to the Inspector of Division Courts, on or before the 15th day of January in every year, showing the number of judgment debtors who, during the twelve months ending the 31st day of December previously, were ordered to be committed, and also of those who were actually committed, under each of the five heads mentioned in section 240 of the Act. pp. 55, 437.

Transfer of Cases to the High Court.

182. When an order of transfer is made, under *The Judicature Act* or *The Division Courts Act*, the Clerk of the Court in which the proceedings were instituted, or the suit is pending, shall annex together all the proceedings and papers filed with him, and transmit the same, together with the order of transference or a copy thereof, to such officer of the High Court as the order directs. pp. 116, 127. Forms 166, 220, 348.

Bailiff's Duties.

183. Every Bailiff receiving summons for service from a Clerk, shall promptly serve the same, and shall immediately after service has been effected make a return to such Clerk, showing the mode of service, and unless such return be duly made within six days after such service, the Bailiff shall not be entitled to the fee for return and attendance and making affidavit; and, where a summons has not been served, the Bailiff shall, immediately after the time for service has expired, return the same to the Clerk, stating the reason for non-service, in writing, on the back of the summons. p. 43, 44, 51, 158, 338.

184. The Bailiff shall attend every sittings of the Court at the place appointed for holding the same, at such time as shall be required by the Judge, and shall see that all suitable preparations are made for the proper accommodation of the Court. He shall make all necessary proclamations, preserve order, call the parties and witnesses, and perform such other duties thereat as may be imposed by the Judge. p. 43.

185. The Bailiff shall keep a book (see Form No. 11), to be called "The Bailiff's Process Book," and he shall enter therein every warrant or execution which shall have been delivered to him to execute, and shall enter from time to time therein what he shall have done under or with such warrant or execution; and if the same be not executed according to the exigency thereof, why it was not so executed; and he shall, at all reasonable times, give to every party interested every information he may require as to the execution or non-execution of any such warrant or execution; and the book so required to be kept shall at all reasonable times be open to the inspection of the Judge or Clerk. pp. 45, 52.

- (a) Bailiffs must return an execution within thirty days prescribed by the Act (section 220) unless it has been renewed at the instance of the execution creditor before the expiration of the thirty days, or, unless the seizure under the execution has been so recent that he has been unable to advertise and sell the property within the thirty days; in which latter case he must make a report to the Clerk of the condition of matters, and of the facts of the case, so as to enable the Clerk to report them to the execution creditor. pp. 51, 392, 393, 417. See Rule 142. Forms 235-237.
- (b) In case the Bailiff has offered the property for sale (after duly advertising it), without being able to either effect a sale or to realize a reasonable amount therefor, he must not sacrifice the property, but must offer it for sale again, if within the thirty days, and if after the thirty days and the execution has not been renewed, the execution must be returned property on hand for want of buyers. p. 417.
- (c) If an execution is returned by the Bailiff property on hand for want of buyers, after the thirty days, the Clerk cannot renew the execution, but must issue another process—directing the Bailiff to sell the property on hand for what it will bring. p. 417. Form 155.
- (d) The whole of the money for debt (or damages, costs, interest, Bailiff's fees and percentage (but not disbursements) must be paid over by the Bailiff to the Clerk from whom he received the execution; and after the Bailiff's fees and charges are duly taxed, the Clerk must pay the Bailiff's proper taxable fees on executions, duly returned according to law, and none others. p. 44, 49, 392, 414. See also Rule 164.

186. Every Bailiff receiving any money by virtue of his office, shall, immediately after the receipt thereof, pay over the same to the proper Clerk, and neglecting or failing to do so, shall be subjected to the loss of his office. pp. 415, 417, 475, 485.

187. The Bailiff or other officer executing any warrant of commitment, shall, at the time of delivering the party arrested to the gaoler, deliver to such gaoler the warrant of commitment, and shall endorse thereon the amount of his fees and mileage, and a statement of the actual day of the arrest. pp. 434, 479, 480. Forms 93, 163.

188.—The Bailiff receiving an execution shall immediately endorse on the same a correct statement of the day and hour of the day when he receives such execution, and, in addition to the formal return (Forms 235 to 237 inclusive) on every execution returned, he shall give a correct and full statement of the particulars, in detail, of all his charges made for fees and disbursements in the execution thereof: and a similar statement in making returns of writs of replevin and attachment. pp. 99, 382, 418, 451.

189.—Every Bailiff shall keep a cash book (Form No. 13), in which shall be entered all payments received by him of moneys on executions or otherwise, from the defendants or garnishees or others. pp. 43, 52. See p. 56 as to Fee Book.

190.—In case a "summons" is not served in time to make the notice of the sittings of the Court, at the foot of "warning No. 2," available for the information of the defendant, the Bailiff shall return the same forthwith to the Clerk who issued the summons, and the Clerk shall add a new notice of the proper days of the week and month on which the two or more ensuing sittings of the Court are to be held, and shall forthwith return or transmit the same to the Bailiff for service, and the proceeding herein directed may be repeated from time to time until due service is effected. pp. 44, 187. See Rules 17, 18, 183.

191.—In case such summons has been sent to a foreign Court the Bailiff shall return it to the Clerk of that Court for transmission to the Clerk of the Home Court, who shall add the new notice above provided for. p. 44.

192.—Every summons must be served ten or fifteen days (according to the residence of the defendant) before the holding of the Court at which it is returnable (neither the day of service nor the day of holding the Court to be counted). pp. 44, 158. See Rules 17, 18, and ss. 100, 101.

193.—At every sittings and at such other times as the Judge shall require, the Bailiff shall deliver to the Clerk of the Court a statement or return on oath, (Form 239), of every warrant and writ of execution in his hands, and of what shall have been done since his last return, under every warrant and writ of execution, which he shall have been required to execute. p. 44. See Rule 179.

194.—The return mentioned in the last rule shall be filed by the Clerk in his office, and be open, without fee, to the inspection of any person interested; and the Clerk shall examine such return, and if found correct and complete, within ten days after the receipt thereof, shall endorse thereon a memorandum in the following words: "I have carefully examined the within return, the same is full, true and correct in every particular, to the best of my knowledge and belief. Dated the day of 18, Clerk." And if such return be found by the Clerk to be incorrect or incomplete, he shall forthwith give notice thereof to the Judge, and if no return be made he shall notify the Judge. p. 44.

195.—In case the proceedings in any suit shall be hindered or delayed by the neglect or misconduct of the Clerk or Bailiff of a Foreign Court or of the Home Court, the Clerk or Bailiff causing the same shall forfeit all fees in such suit, and shall, in addition thereto, pay any loss or damage that may result from such hindrance or delay to the party suffering therefrom. pp. 43, 485.

196.—No Clerk or Bailiff shall, directly or indirectly, purchase or be concerned in the purchase, or have any personal interest in a suit or judgment or claim in suit, in the Court of which he shall be an officer, and any Clerk or Bailiff transgressing this rule shall be subjected to the loss of his office. pp. 51, 372, 417, 485.

197.—No Clerk or Bailiff shall, either by himself or his partner in business, be engaged either directly or indirectly as agent for any party, during the conduct of the cause in Court,—and any Clerk or Bailiff transgressing this rule shall be subjected to the loss of his office. pp. 51, 154, 417, 485.

198.—In case a defendant determines to settle an action or pay the demand of a plaintiff, or pays money into Court under section 125, such settlement of the amount or payment of money into Court, must be made with or to the Clerk of the Division Court in which the suit was entered, or the proceedings thereof are being carried on. pp. 39, 380, 387. See Rule 154b.

199.—No Bailiff of any Court shall have the right or be allowed to take or receive any money from any defendant or party in any cause, either in settlement or on account of any debt sued or claimed, or of the costs thereon, except in cases in which he has an execution in his hands against the defendant or party, or a warrant of commitment, and no Clerk shall have the right or be allowed to take or receive any money from any defendant or party in any cause, either in settlement or on account of any debt or costs, unless a suit has been commenced in his own Court for the recovery thereof, or the claim is actually in his hands for suit, or a transcript of judgment against the defendant or party has been sent to him from some other Court. pp. 39, 52, 170, 386, 387.

Judgment Summons.

200. A party having an unsatisfied judgment, who desires to proceed under the 235th and subsequent sections of the Act, shall file with the Clerk an affidavit (Form No. 33), or to the like effect, and thereupon a summons (Form No. 54), bearing the proper new number in its order, shall be issued; if the proceeding be taken in a Division Court other than that in which the judgment was entered, there shall be delivered to the Clerk a transcript of such judgment. p. 421.

201. In order that a party who after examination has been discharged by the Judge may not be again summoned for examination at the suit of the same or any other creditor, without notice of such examination, every Clerk shall keep a book in which entries may be made in the form of an index, to be called the "Judgment Debtors' Book," (Form 8) in which shall be entered the date when each judgment debtor was examined and discharged by the Judge, together with the number and style of the cause in which he was summoned and examined. p. 424. Form 34.

202. In case a judgment debtor who resides more than three miles from the place of the sitting of the Court, is summoned under section 235 of the Act, and does not attend, such non-attendance shall not be considered wilful, unless he shall have been paid or tendered, when summoned, a sum equal to seventy-five cents for his day's attendance, and ten cents for each mile from his place of residence to the place of such sitting of the Court. Such payment to be costs in the cause unless otherwise ordered by the Judge. p. 423.

Warrants of Commitment.

203. Warrants of commitment shall bear date on the day on which the order for commitment is made, and shall have endorsed thereon the amount of debt and costs on such proceedings, or of fine and costs up to the time of its delivery to the Bailiff for execution, and shall continue in force for six calendar months from such date and no longer, unless renewed by an *ex parte* order of the Judge upon affidavit showing the cause of the non-execution, and that the moneys payable thereunder have not been satisfied. (Forms 162 and 162a.) pp. 432, 434. See Rules 187.

204. Upon application (which may be made *ex parte*) founded upon affidavit, showing to the satisfaction of the Judge the cause of the non-execution of such warrant and that the moneys payable thereunder have not been satisfied, such Judge may, during the continuance of the warrant of commitment, order that the same may be renewed for a further period. Such renewal shall not be for a period exceeding six calendar months, and may, in the discretion of the Judge, be for a less period. p. 434.

205. The renewal of a warrant shall be made by the Clerk, and shall be marked on the margin of the warrant, or by endorsing thereon—
 "Renewed by Judge's order for _____ calendar months from the
 day of _____, A.D. 18 ____ X. Y., Clerk."

p. 434.

Payment on Arrest.

206. When a warrant of commitment is issued, the defendant may, at any time before his body is delivered into the custody of the gaoler, pay to the Bailiff the amount endorsed on the warrant, as that on the payment of which he may be discharged, and the Bailiff shall forthwith give a receipt therefor. On receiving such amount, or at the request of the judgment creditor, in writing, the Bailiff shall discharge the defendant, and shall, within twenty-four hours after receiving such amount, pay over the same to the Clerk of the Court who issued the warrant. pp. 434, 435.

AMENDMENTS AND CHANGE OF PARTIES.

207. Where an action has been commenced in the name of the wrong person as plaintiff, or where it is doubtful whether it has been commenced in the name of the right plaintiff or plaintiffs, the Court or a Judge, if satisfied that it has been so commenced, through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute so to do, may order any other person or persons to be substituted or added as plaintiff or plaintiffs, upon such terms as may seem just, but no person shall be added or substituted as a plaintiff without his own consent. pp. 157, 175, 177. See Form 217.

208. In case it is found that a wrong party, as defendant, primary debtor or garnishee, has been sued or served with a summons, and it is desired to add a party under section 198, the Judge may grant an order therefor after action commenced *ex parte*, provided those persons who have been already made parties have not been served with the summons. If the application be made after service of the summons, the order adding other parties, as defendants, primary debtors or garnishees, must only be granted upon notice to those parties who have been already served with the summons. pp. 178, 180.

209. In case an amendment is directed or allowed to be made at the trial, it shall not be necessary to draw up or issue an order therefor; the amendment may be at once made, or a minute of the amendment to be made may be entered in the procedure book. (C.J.R. 446.) pp. 36, 180. See also Rule 243.

210. Where several persons are made defendants, and all of them have not been served, the name or names of the defendant or defendants who have not been served, may, at the instance of either party, be struck out by order of the Judge, on such terms as he shall think fit; and the cause shall then proceed against the party served as to set-off, counter-claim and other matters, as if all the defendants had been served. p. 178. See Rule 116.

211. Any application to add or strike out, or substitute a plaintiff or defendant may be made to the Judge at any time before trial, by motion or notice, or at the trial of the action in a summary manner. pp. 177, 180.

212. In any case wherein it appears to the Judge, that a party, defendant, has been improperly added, merely for the purpose of giving the Court jurisdiction or colorable jurisdiction, over a cause of action, to the prejudice or inconvenience of another defendant or otherwise, the Judge may, in his discretion, strike out the name of such party and disallow all costs that may have been incurred by making him a defendant, and allow to him such costs as he has been put to by reason of having been made such defendant; and thereby leave the remaining parties to their rights, whatever they may be, as to jurisdiction or otherwise. p. 179.

213. When a person, other than the defendant, appears at the hearing, and admits that he is the person whom the plaintiff intended to charge, his name may be substituted for that of the defendant, if the plaintiff consents, and thereupon the cause shall proceed, as if such person had been originally named in the summons; and, if necessary, the hearing may be adjourned on such terms as the Judge may think fit; and the costs of the person originally named as defendant shall be in the discretion of the Judge. pp. 178, 182. See Rule 221.

214. Where a party sues, or is sued in a representative character, but at the hearing it appears that he ought to have sued or been sued in his own right, the Judge may, at the instance of either party and on such

terms as he shall think fit, amend the proceedings accordingly, and the case shall then proceed in all respects, as to set-off, counterclaim and other matters, as if the proper description of the party had been given in the summons. pp. 155, 178, 179.

215. Where a party sues, or is sued in his own right, but at the hearing it appears that he ought to have sued or been sued in a representative character, the Judge may, at the instance of either party and on such terms as he shall think fit, amend the proceedings accordingly, and the case shall then proceed in all respects as to set-off, counterclaim and other matters, as if the proper description of the party had been given in the summons. pp. 155, 178, 179.

216. No action or matter shall be defeated by reason of the misjoinder or nonjoinder of parties, and the Judge may in every action or matter, deal with the matter in controversy so far as regards the rights and interests of the parties actually before him. The Judge may at any stage of the proceedings, either upon or without the application of either party, and in such terms as may be just, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties be added, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the Judge may be necessary in order to enable him effectually and completely to adjudicate upon and settle all the questions involved in the action or matter. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent in writing thereto. Every person whose name is so added as defendant shall be served with a copy of the order so adding him, and the proceedings as against such party shall be deemed to have begun only on the service of such order. pp. 175, 177, 178. See Rule 221.

217. Where it appears at a trial that a less number have been made plaintiffs than by law required, the name of the omitted person may, at the instance of either party, be added, by order of the Judge, on such terms as he shall think fit, and thereupon the action shall proceed, in all respects as if the proper persons had been originally made parties; and if such persons shall, either at the trial or at some adjournment thereof, personally or by writing, signed by him or his solicitor, consent to become a plaintiff in manner aforesaid, the Judge shall then pronounce judgment as if such person had originally been made a plaintiff, but if such person shall not consent to become a plaintiff in manner aforesaid, either at the trial or at the adjournment thereof, the action or matter shall be struck out. pp. 155, 177. See also Rules 207, 216.

218. Where the name or description of a plaintiff in the summons is insufficient or incorrect, it may be amended at the instance of either party, by order of the Judge, on such terms as he shall think fit, and thereupon the action shall proceed in all respects, as if the name or description had been originally such as it appears after the amendment has been made. pp. 155, 178.

219. Where the name or description of the defendant in the summons is insufficient or incorrect, it may be amended at the instance of either party by order of the Judge, on such terms as he shall think fit, and thereupon the action shall proceed, in all respects, as if the name or description had been originally such as it appears after the amendment has been made; but if no objection is taken to the name or description, the action may proceed, and in the judgment and all subsequent proceedings founded thereon, the defendant may be named and described in the same manner. p. 178.

220. In actions or matters by or against a husband, if a wife or a husband be improperly joined or omitted, or if one of them be improperly substituted for the other, the summons may at the trial be amended at the instance of either party by order of the Judge, on such terms as he shall think fit, and thereupon the action shall proceed, in all respects, as if the proper person had been made party to the action. p. 179.

221. Where a defendant is added or substituted, except where a defendant is substituted under Rule 313, an order shall be drawn up, and together with a copy of the summons and particulars of claim, and a notice setting forth the day and place upon and at which he is to attend at the court, shall be served upon him, according to the practice in the case of service of ordinary summons. p. 180, 182.

Where a Person Brought in Does not Appear at the Trial.

222. If a person not originally a party to the action, who has been served with a copy of an order adding him as a party, does not appear at the trial, the Judge may proceed with the trial, notwithstanding, and give such judgment or make such order as may be just against the person so served and not appearing, or may adjourn the trial, and give such directions and make such orders as to costs as he shall think fit. p. 182.

223. An action or matter shall not become abated by reason of the marriage, death or insolvency of any of the parties, if the cause of action survive or continue, and shall not become defective by the assignment, creation or devolution of any estate or title *pendente lite*, and whether the cause of action survives or not, there shall be no abatement by reason of the death of either party between the verdict of finding of the issues of fact and the judgment, but judgment may in such case be entered notwithstanding the death. pp. 180, 302.

224. Where by reason of any event occurring after the commencement of any action or matter, there shall be any assignment, creation, change, transmission or devolution of the interest, estate, or title of any plaintiff in any action or matter before judgment, the person to, or upon whom such interest, estate or title has come or devolved, may give notice thereof to the Clerk, with his name and address, together with an affidavit of the truth of the fact stated in such notice. pp. 177, 181. Form 206. See Rule 241.

- (a) And thereupon such Clerk shall cause a copy of such notice to be given to the defendant in the action or matter, in which shall be embodied a notice that unless upon a day to be named therein he appears and shows cause against the same, the person to or upon whom such interest, estate or title has come or devolved, will be substituted for, or made a joint plaintiff with, the plaintiff named in the original summons. p. 181. See Rules 169, 241.

Substitution of a Defendant.

225. Where, by reason of any event occurring after the commencement of any action or matter, there shall be any assignment, creation, change, transmission or devolution of the liability, interest, estate or title of any defendant, in any action or matter, before judgment, the plaintiff, or the defendant, or the person to or upon whom such liability, interest, estate or title has come or devolved, may, in like manner, give notice to the Clerk, who shall take proceedings thereon, similar to those prescribed by the last preceding rule, and a defendant may be substituted or added, as the case may be, in manner similar to that provided in such rule for the substitution or addition of a plaintiff. p. 181. Forms 217, 294.

Change of Parties or New Capacity.

226. Where, by reason of any event occurring after the commencement of any action or matter, and causing a change or transmission of interest or liability, or by reason of any person interested coming into existence after the commencement of the action or matter, it becomes necessary or desirable that any person, not already a party, should be made a party, or that any person already a party should be made a party in another capacity, an order that proceedings shall be carried on between the continuing parties and such new party may be obtained, before or at the trial, on application to the Judge, upon an allegation of such change or transmission of interest or liability, or of such person interested having come into existence. pp. 181, 182. Form 294.

Notice of Order Therefor.

227. An order obtained as in the last preceding rule mentioned shall, unless the Judge shall otherwise direct, be served upon the continuing parties, or their solicitors, and also upon each such new party, unless the person making the application be himself the only new party, and the order shall from the time of such service, subject nevertheless to the next two following rules, be binding on the persons served therewith, and every person served therewith, who is not already a party to the action or matter, shall be bound to appear at the trial, and in the same manner as if he had been served with a summons. p. 182. Form 304.

228. Where any person being under no disability, or under no disability other than coverture, or being under any disability other than coverture, but having a guardian *ad litem* in the action or matter, shall be served with such order as mentioned in Rule 226, such person may, at or before the trial, apply to the Judge to discharge or vary such order. p. 182.

229. Where any person being under any disability other than coverture, and not having a guardian *ad litem* in the action or matter, is served with any order as mentioned in Rule 226, such person may, before or at the trial, apply to the Judge to discharge or vary such order. p. 182.

230. When the plaintiff or defendant in an action or matter dies, and the cause of action survives, but the person entitled to proceed fails to appear on the return day, the trial may be adjourned or judgment may be entered for the defendant, or (*as the case may be*) for the person against whom the action or matter might have been continued; and in such case if the plaintiff has died execution may issue, as provided by Rule 140. p. 181.

231. Where a plaintiff or defendant is substituted, or added, or there is a change of parties under these rules, the procedure book shall show the same by proper entries thereof, and if necessary the cause thereafter may be entered in a new place in the procedure book, retaining the original year number of the cause, and all subsequent proceedings are to be carried on under the altered title with the same year number. pp. 36, 180.

GENERAL RULES.

232. Claims by or against husband and wife may be joined with claims by or against either of them separately. p. 90.

233. The Court has no jurisdiction to try an action upon a note of hand, whether brought by the payee or any other person, the consideration, or any part of the consideration of which, was any gambling debt, or for spirituous or malt liquors, or other like liquors, drunk in a tavern

or ale-house. The term "note of hand" in the Act and in this rule shall be held to include promissory notes, bills of exchange, cheques, orders for the payment of money, due bills, I.O.U.'s. and all evidences of debt under the hand of the debtor. pp. 72, 75.

Infants.

234. A minor may sue in a Division Court for any sum not exceeding \$100, due to him for wages, in the same manner as if he were of full age. p. 116.

235. Where a minor applies to enter a suit for any cause of action other than for wages, or is a claimant in an interpleader proceeding, he shall procure the attendance of a next friend at the office of the Clerk, at the time of entering the same, who shall sign an undertaking (Form 194) to be responsible for costs; and the cause shall proceed in the name of the infant by such next friend, but no order shall be necessary for the appointment of such next friend. If the plaintiff or claimant fail in, or withdraw, or discontinue his suit, and do not pay the amount of costs awarded against him, proceedings may be taken for the recovery of such amount from the next friend, as for the recovery of any judgment debt. p. 117.

236. No proceeding shall be defeated by any formal objection. pp. 155, 183, 272, 378.

237. Non-compliance with any of these rules shall not render any proceeding in any action or matter void, unless the Judge so directs, but such proceeding may be set aside, either wholly or in part as irregular, or amended, or otherwise dealt with in such manner and upon such terms as the Court or Judge thinks fit. pp. 183, 272, 378.

238. No application to set aside process or proceedings for irregularity shall be allowed, unless made within a reasonable time, nor if the party applying has taken a fresh step, after knowledge of the irregularity. p. 378.

239. The Judge may at any time, and on such terms as to costs and otherwise as to him may seem just, amend any defect or error in any proceedings; and all such amendments may be made as may be necessary, for the advancement of justice, determining the real question raised by or depending on the proceedings, and best calculated to secure the giving of judgment according to the very right and justice of the case. pp. 155, 183, 244, 378, 466.

240. All notices required by these rules, or by the practice of the Court, shall be in manuscript or print, unless expressly authorized by the Court, or a Judge, or these rules to be given orally. pp. 153, 188, 206, 207, 226, 465.

Parties to Leave Address with Clerk.

241. Whenever the plaintiff shall enter his claim for suit, or the defendant or any other party shall give notice of set-off, counterclaim or other defence, he shall give to the Clerk his address, or that of his solicitor or agent, and the delivery of any notice to such plaintiff or defendant or other party, his solicitor or agent, or the mailing thereof by the Clerk to such address, shall be a sufficient service, but the Judge may, in his discretion, put off a trial, or set aside or stay proceedings, on his being satisfied that there is good cause so to do. pp. 181, 182, 199, 248, 391, 494. See Rule 169, and sec. 124.

As to Unauthorized Forms and Proceedings.

242. All proceedings, books and documents shall be in forms similar to the forms to these rules appended, where the same are applicable, and

no printed forms shall be used by any Clerk or Bailiff of a Division Court unless in accordance with the forms appended to these rules, and if an unauthorized form shall be used no fee shall be payable to the officer in respect thereof, and in cases where no forms are provided, parties shall frame the proceedings or documents using as guides those appended to these rules.

- (a) Any printed forms or books which, with the approval of the Judge, have been used previous to the framing and approval of these rules, may be used, unless and until the Judge shall otherwise order. See pp. 486, 501.

243. Except where otherwise provided by statute or by these rules, no order giving leave to take any proceeding need be drawn up or served unless the Judge shall otherwise order; but such leave shall be minuted in the procedure book. p. 285.

Payment into Court.

244. When the plaintiff shall, in accordance with the 123rd or 126th sections of the Act signify to the Clerk his intention to proceed for the remainder of his demand, and such signification shall be given within three days after he received notice of the payment into Court, but after the rising of the Court at which the summons was returnable, the case shall be tried at the then next sittings of the Court, and be put upon the list for that Court in the regular order, but upon application to him at any time the Judge may further postpone the trial. pp. 36, 99, 223, 495.

245. When an action has been stayed, under the provisions of section 123 or of section 126 of the Act, the Judge shall have power, upon application made for that purpose by the plaintiff, explaining in a satisfactory manner his omission to signify his intention to proceed, and after hearing the parties, to remove such stay and to allow the action to proceed, upon such terms as he shall deem just. pp. 223, 227, 495.

246. In an action of detinue the defendant may with a tender of the subject of the action for the detention whereof the action is brought, pay money into Court as compensation for damages for the detention thereof, and for injury caused thereto, or either or both, with costs of the action. pp. 99, 221, 226, 495.

- (a) Where the defendant is desirous of paying money into Court, pursuant to this rule, the practice respecting the same shall, in all respects, be regulated by that under which a defendant may pay money into Court in other actions as provided by the Act and these rules. p. 221. See Rules 61, 62, 170, 171. Forms 128, 161.

Suitors' Moneys: How Payable.

247. All moneys are payable to the parties at the office of the Clerk, without the payment of any fee whatever. In case a party desires that money shall be transmitted to him, he shall give to the Clerk written directions as to the mode of transmission, and in the absence of such directions the Clerk shall not in any case transmit moneys of suitors. Moneys transmitted according to such directions shall be at the risk of the party who gave them. All necessary expenses incurred in transmission of moneys shall be borne by the party to whom transmitted, and may be deducted by the Clerk. pp. 27, 38, 243, 389, 497.

248. When the Clerk issues and transmits a transcript to the Clerk of any other division, the plaintiff or person entitled to such money, may by an order in writing, endorsed on the transcript, signed by such plaintiff, or person, direct the Clerk of the Foreign Court to pay over the money.

when collected, to the transmitting Clerk or Clerk of the Home Court, or in any other way the person so entitled may desire and direct. pp. 38, 497.

249. All summary applications to a Judge in Chambers, other than applications for new trials, may be made on notice or by summons. pp. 180, 182, 304. Form 215.

250. When anything required by the practice of the Court to be done by either party, before or during the hearing, has not been done, the Judge may, in his discretion and on such terms as he shall think fit, adjourn the hearing to enable the party to comply with the practice. pp. 210, 213, 223, 224, 243.

251. All applications to the Judge to set aside or stay any order, judgment, process or proceeding in any cause or matter in a Division Court, and all other applications, except in matters which may be disposed of upon an *ex parte* application to the Judge, and applications otherwise specially provided for by these rules, may be made *viva voce* at any sitting of the Court, if both parties be present, or upon affidavit, the opposite party having notice of such application and of the grounds thereof, and the order or decision of the Judge upon such application, if made at a sitting of the Court, shall be entered by the Clerk as in other cases of order made; if made upon affidavit elsewhere it shall be mailed to the Clerk or delivered at his office. pp. 192, 270, 284, 285, 394.

Discontinuance of Action.

252. If the plaintiff desires to discontinue the action or matter against all or any of the parties thereto, he shall give notice thereof in writing (by post or otherwise) to the Clerk and to every party as to whom he so desires to discontinue, and the party receiving such notice may apply to the Judge for an order against the plaintiff for the costs incurred before the receipt of such notice. pp. 188, 375.

- (a) Where in a contested case the defendant or other party has prepared for trial, and before the opening of the Court, the plaintiff has withdrawn or discontinued the action, so short a time before the sitting of the Court, that the defendant, or other party, cannot in the ordinary way be notified thereof, and without such notice the defendant *bona fide* and reasonably incurs expenses in procuring witnesses or in attending Court, or in a contested case where a counsel fee might be ordered to be taxed if the case had proceeded to trial and the defendant has employed counsel or a solicitor, who has attended the Court to conduct the defence for him, the Judge may, in his discretion, order the plaintiff to pay such costs, or such disbursements, or counsel fee, or such portion thereof as to him may seem just. p. 376. See Rule 289.

Abatement.

253. In case, owing to any cause, a sitting of the Court is not held on the day appointed, and the Court is not adjourned, then, unless the Judge shall otherwise order, no matter or action which should have been tried or heard at such sitting, shall abate or be discontinued, but the same shall be considered to have been adjourned to the next sitting of the same Court, and shall, at such sitting, be entered upon the Judge's list of causes for trial. pp. 5, 216, 272.

254. Subject to rules of Court, the Judge of the County Court, or any other Judge acting for him, shall have power to sit and act at any time for the transaction of any part of the business of the Division Court, or

for the discharge of any duty which by any statute or otherwise was formerly required to be discharged out of, or during the regular sitting of the Court. pp. 5, 120, 210.

255. Where the plaintiff's claim, or defendant's counterclaim or set-off, consists of a promissory note, or other instrument, or is on a guarantee, it shall not be necessary to copy the instrument upon which the claim is founded, but it may be set forth in particulars with reasonable certainty. p. 345. See Form 14.

Satisfaction of Judgment.

256. Any party to a judgment to whom accord and satisfaction or payment of such judgment has been made, may be required by the party against whom such judgment has been rendered, to enter, or to authorize the Clerk to enter satisfaction thereof, and in case of his refusal or neglect to do either, the Judge may, upon application therefor, order satisfaction to be entered by the Clerk in the procedure book. p. 376. See Form 225.

257. It shall be lawful for the Judge, upon the application of any party to an action or matter, and upon such terms as may be just, to make any order for the detention, preservation, inspection, surveying, or measuring of any property or thing being the subject of such action or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid to authorize any persons to enter upon or into any land or building in the possession of any party to such action or matter, and for all or any of the purposes aforesaid to authorize any samples to be taken, or any observation, plan, or model to be made, or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence. pp. 209, 248, 249, 267.

258. Where an order is made for inspecting, surveying, measuring, weighing, making any experiment, or for taking any sample, or making any plan or model, by any person to be named therein, such order may include an order for the Clerk or some other person to be named therein, to examine upon oath and take the deposition of the person so named as to such measure, weight or inspection, or the correctness of such survey, or the result of such experiment, or the fairness of such samples, or the accuracy of such plan or model, and such order may also empower any or either party to give the deposition so taken in evidence upon any trial or proceeding. p. 268.

259. When by any contract a *prima facie* case of liability is established, and there is alleged as matter of defence a right to be relieved wholly or partially from such liability, the Judge may make an order for the preservation or interim custody of the subject-matter of the litigation, or may order that the amount in dispute be brought into Court or otherwise secured. p. 209, 268.

260. So far as applicable the rules and the forms shall extend and apply to provisional counties, provisional judicial districts, territorial districts and temporary judicial districts. (See appendix.)

261. Regular meetings of the board, when necessary, may be held upon the call of the chairman, or of any two members of the board, and at the City of Toronto.

AFFIDAVITS AND OATHS.

262. Every affidavit, and other proceeding of the like nature, shall be divided into numbered paragraphs, and shall state concisely such matters and facts as may be necessary to truly inform the Court. pp. 144, 145, 170. Form 22.

263. Every affidavit shall be drawn up in the first person, stating the name of the deponent at the commencement in full, and his description

and true place of abode, and shall be signed by him, and in any proceeding in the Court must be entitled in the Court and cause (if a cause has been commenced) stating the names in full of the parties as in the summons. pp. 144, 145, 170.

264. In every affidavit, made by two or more deponents, the names of the several persons making the affidavit shall be inserted in the jurat, except that if the affidavit of all the deponents be taken at one time by the same officer, it shall be sufficient to state that it was sworn by both (or all) of the above-named deponents. pp. 144, 145, 170.

265. All affidavits, other than those for which forms are given, shall state the deponent's sources of knowledge or what facts or circumstances deposed to are within the deponent's own knowledge, and his means of knowledge, and what facts or circumstances deposed to are believed by him, by reason of information derived from other sources than his own knowledge, and what such sources are. p. 144, 170, 197.

266. Where an affidavit is sworn by any person who appears to the officer taking the affidavit to be illiterate or blind, the officer shall certify in the jurat that the affidavit was read in his presence to the deponent, that the deponent seemed perfectly to understand it, and that the deponent made his signature in the presence of the officer: no such affidavit shall be used in evidence or read in the absence of this certificate, unless the Judge is satisfied that the affidavit was read over to and appeared to be perfectly understood by the deponent. pp. 144, 145, 170.

267. For ordinary affidavits in a cause, the general heading and conclusion, given in Form No. 22, should be used, except where another form is provided. pp. 144, 146, 170. See Rule 264.

268. No affidavit having in the jurat or body thereof any interlineation, alteration or erasure, shall, without leave of the Judge, be read or made use of, in any matter pending in the Court. pp. 144, 170.

269. Oaths and affirmations administered to witnesses in open Court or upon any *viva voce* examination before the Judge, and to jurors and others may be in the forms prescribed. (See Form 41.) p. 144, 370.

Married Women.

270. Married women are capable of suing and being sued in the Division Courts, as provided in *The Married Women's Property Act*, (R.S.O. cap. 132). See pp. 25, 77, 90, 117, 189, 190, 200, 420, 502.

271. In every suit against a married woman founded on a contract made by her during marriage, there shall be inserted in the particulars of claim words to the effect following: "The defendant A.B., is a married woman, and had separate property when she contracted the liability in question, and contracted with respect to such separate property. pp. 189, 190, and other pp. *supra*."

272. If the summons be a special summons, properly endorsed, and the defendant does not dispute the claim or deny the allegation with respect to the separate estate, the Clerk may sign final judgment, pursuant to section 109 of the Act. pp. 189, 200. Forms 88, 157.

273. All judgments against a married woman, in respect of liabilities incurred, whether for costs or otherwise, during marriage, shall be in the following form or to the like effect: "It is adjudged that the plaintiff (or defendant) do recover \$ and costs against the defendant (or plaintiff), such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not otherwise: and it is ordered that execution hereon be limited to the separate property of the defendant (or plaintiff),

A.B., not subject to any restriction against anticipation, unless, by reason of *The Married Women's Property Act*, the property shall be liable to execution notwithstanding such restriction." pp. 189, 200.

274. Where a judgment is recovered against a married woman in respect of a debt contracted by her before marriage, the judgment may be in the form following: "It is adjudged that the plaintiff do recover the sum of \$ and costs against the defendant, A.B., such sum and costs to be payable out of her separate property, whether subject to any restriction against anticipation or not, and not otherwise." p. 189, 200.

Trials and Hearings.

275. In cases where the hearing is by jury the Judge has the same power to non-suit as in ordinary cases. pp. 209, 305.

276. It is determined and ordered that the trial of a cause shall not be considered to have been concluded, in case the giving of judgment has been postponed by the Judge to a subsequent day, until the delivery thereof in writing at the Clerk's office upon the day and at the hour named therefor by the Judge, or orally by Judge at some sitting of the Court. pp. 272, 273. See Rule 161.

Leave to Dispute Plaintiff's Claim.

277. The leave to dispute the claim of the plaintiff in any action, before judgment, under section 112 of the Act, may be obtained on the *ex parte* application of the defendant, or his solicitor, on sufficient grounds being shown by affidavit. p. 206. See Forms 198 and 275-278. Rules 121, 167, 169, 300.

Action Pending in Another Court for Same Cause.

278. Where, at the trial, it shall appear that an action for the same cause at the suit of the same plaintiff is pending in any other Court, the Judge may order the trial to stand adjourned to a certain day, and unless before such day the action in such other Court shall have been discontinued, the action may be dismissed or stayed as the Judge shall determine.

Inspection of Property by Judge.

279. The Judge by whom any action or matter may be tried may, in his discretion, inspect, or order the jury to inspect, any property or thing concerning which any question may arise therein. pp. 208, 307.

Adjournment of Suit.

280. Where a cause is adjourned, no order of adjournment shall be served on either party, except by direction of the Judge. p. 213. See Rule 286.

Putting off Trial.

281. Either party to an action or matter may, at any time before the hearing, and upon notice to the opposite party, apply to the Judge, in writing, for an order to put off the trial on account of the absence of a material witness (whose name should be stated), or other sufficient grounds, to be disclosed on affidavit, and the Judge, in granting or refusing the application, may impose such terms as to the payment of costs and otherwise as he thinks fit. pp. 124, 215, 251.

282. When a plaintiff avails himself of the provisions of section 106 of the Act, and proceeds against only one or more of the several persons jointly liable, the defendant sued may avail himself of any set-off, counterclaim, or other defence to which he would be entitled, if all the persons liable were made defendants. pp. 112, 171.

New Trial.

283. Application for new trial may be made *via voce*, and determined on the day of hearing, if both parties be present; but if made when both parties are not present, it shall be in writing, and show briefly the grounds on which it is made, which grounds, if matters of fact requiring proof, shall be supported by affidavit. p. 284. Form 268.

- (a) A copy of the application and of every such affidavit shall be served by the party making the same on the opposite party or his solicitor or agent, or left at his usual place of business, if within the division; or if without the division, then with the Clerk, who shall, on receiving the fees and necessary postage, transmit the same forthwith to the opposite party. p. 285.
- (b) The application and affidavits (if any), together with an affidavit of the service thereof, on the Clerk or the opposite party (as the case may be), shall be delivered to the Clerk, within fourteen days after the day of trial, to be by him, on receiving the fees and necessary postage, transmitted to the Judge, with a copy of the original claim, and other papers requisite to the proper understanding of the case, in manner hereafter stated, which delivery to the Clerk shall operate as a stay of proceedings until the Judge's final decision on the application is communicated to the Clerk, unless the Judge shall otherwise order. p. 285.
- (c) The Clerk, after receiving such papers, shall delay for six days forwarding the same to the Judge, to enable the opposite party to answer the same in writing or by affidavit, if facts stated by the applicant in his affidavit are disputed, at the end of which period the Clerk shall transmit the whole of the papers to the Judge for his consideration. If the application be refused, or if the party applying shall fail to comply with the terms imposed by the Judge, the proceedings in the suit shall be continued as if no such application had been made. The Judge, before deciding the same, may hear the parties on the matter of such application at the next sitting of the Court, or at such other time or place as he may appoint. The decision of the Judge shall be delivered to the Clerk, or transmitted to him by mail, and such Clerk shall notify the parties thereof by mail or otherwise, and if a new trial be granted, the suit shall be tried at the next sitting of the Court, unless the Judge shall otherwise order. pp. 285, 290.
- (d) If the application be refused, or if the party applying shall fail to comply with the terms imposed by the Judge, the proceedings in the suit shall be continued as if no such application had been made. p. 290. Form 178.
- (e) The Judge may, in his discretion, make it a condition of granting a new trial that it shall take place before a jury, whether the first trial took place before a jury or not; but if either party required a jury to try the case, in the first instance, he shall be entitled to another jury on depositing the necessary fees for summoning such jury; and in such case, the order for the new trial shall direct the summoning of a jury. p. 290. Form 197.
- (f) Where, under the 144th section of the Act, judgment in writing is delivered at the Clerk's office, application for a new trial may be made within fourteen days from the day of delivering such judgment. p. 273.

284.—If upon an application for a new trial, the Judge, instead of granting a new trial, pronounces the judgment which in his opinion ought to have been pronounced at trial, the fact shall be noted in the procedure book, and the order for judgment shall be transmitted to the Clerk. pp. 284, 290. Forms 179, 180.

285.—It is considered and ordered (lest there be a conflict of decision or diversity of action in the exercise of the discretion with which the Judge is invested under section 146) that upon an application for a new trial, the Judge, instead of granting a new trial, may pronounce the judgment which, in his opinion, ought to have been pronounced by the Judge who tried the case, without a jury, and that in that case, only, may he order judgment to be entered accordingly; but that he has no such discretion or authority in dealing with an application for a new trial and setting aside a verdict of a jury. This rule shall not be construed to prevent a judge upon an application for a new trial in a jury case, from ordering that a non-suit be entered, in case he shall be of opinion that he ought to have entered judgment of non-suit at the trial. p. 289. See section 175a pp. 317, 318.

Notice to Parties of Adjournment of Case.

286.—In case neither of the parties appear at the trial, the Judge may either strike out the case or postpone the trial. In case of postponement, the Clerk shall notify all parties by postal card of the adjournment and of the date of the sitting to which it has been adjourned. pp. 208, 213.

Inspection of Documents.

287.—When, in any action or matter, any party thereto is desirous of inspecting any document in which he has an interest, and which shall be in the possession, power, or control of any other party, he may, within four days from the day of the service of the summons, give notice to such other party, by prepaid and registered post letter, or otherwise, that he desires to inspect such instrument, at any place to be appointed by such other party, and being within the division in which the suit is brought, and such other party shall appoint a place accordingly; but if he neglects or refuses to appoint such place, or to allow the party giving the notice, or his solicitor or agent, to inspect it within three days from the day of receiving such notice, the Judge may, in his discretion, on the day of hearing, exclude such document from being given in evidence in such action or matter, or adjourn the cause for the purpose of such inspection, and make such order as to costs as he shall think fit. pp. 205, 248.

Fees and Costs.—Counsel Fees.

288.—Where, in a contested case for more than \$100, an agent has been employed by the successful party in the conduct of the cause or defence, the Judge shall not direct a fee to be taxed, pursuant to section 208 of the Act, unless such agent is a barrister or a solicitor. pp. 216, 374.

289.—A case shall be considered "contested,"

- (1) Where a defence is put in, disputing a claim for more than \$100, and a counsel or solicitor has been retained to prosecute or defend the claim in Court, at the sittings, and the case comes down to trial, whether any actual contest is made at the Court or not.
- (2) Where a defence is put in, disputing a claim for more than \$100, and a counsel or solicitor has been retained to make an application under section 111, and an order is made therein by the Judge empowering the Clerk to enter final judgment.

- (3) Where a defence is put in, disputing a claim for more than \$100, and a counsel or solicitor has been retained to prosecute the claim in Court, and the defendant afterwards and before the opening of the Court, confesses judgment, or pays or settles the claim so short a time before the sitting of the Court that the plaintiff cannot in the ordinary way be notified thereof, and without such notice, the counsel or solicitor so retained to prosecute the claim *bona fide*, attends the Court for that purpose.
- (4) Where a defence is put in, disputing a claim for more than \$100, and the defendant has retained a solicitor or counsel to defend the action for him in Court, and the plaintiff does not appear in Court to prosecute his action, or withdraws or discontinues his action so short a time before the sitting of the Court that the defendant cannot in the ordinary way be notified of such withdrawal or discontinuance, and without such notice his solicitor or counsel *bona fide*, attends the Court to defend such action. pp. 216, 374.

290. A counsel fee may be ordered to be taxed in a contested case, under section 208.

- (a) Where the plaintiff's claim exceeds \$100;
- (b) Or, in the case of interpleader, where the money claimed, or the value of the goods or chattels claimed or the proceeds thereof exceeds \$100;
- (c) Or, where, in interpleader, the damages claimed by, or awarded to either party against the other party, or against the Bailiff exceed \$60.
- (d) In all other cases mentioned and referred to in sub-section (2) of section 148.
- (e) Where the defendant gives notice of set-off or counterclaim and establishes the same to an amount exceeding \$100, and judgment is given in his favor. p. 374.

Witness Fees.

291. The Clerk shall determine (subject to appeal to the Judge) what number of witnesses shall be allowed on taxation of costs; the allowance for whose attendance shall be according to the scale, and before allowing disbursements to witnesses, the Clerk shall be satisfied that the witnesses attended, and that the claim or fees is just, and he may, and in case of dispute shall require the party whose bill of costs is being taxed to furnish an affidavit of disbursements. pp. 138, 251, 254, 373.

292. In case of any process or paper received for service or execution from a "Foreign Court," the Clerk so receiving the same and procuring the service or execution thereof shall, on returning the same, give a full and correct statement, in detail, of the items of all charges made for fees and disbursements in respect of such service or execution of process, and the Clerk of the Home Court shall report to the Judge of his own county any charge made by the Clerk of the "Foreign Court" in excess of the allowance for fees made by the tariff.

Staying Proceedings.

293. The Judge may stay proceedings in a Division Court in any case in which, if the action were in the High Court, an order to stay might be made. p. 269.

294. Proceedings may be stayed by order of the Judge in an action until security shall be given to the defendant for the costs of and inci-

dental to his defence, in a case and under circumstances which would justify such an order being made in the High Court. p. 270.

Allowance of Costs by Judge.

295. Where the Judge directs a fee to be taxed to the successful party under section 208, or orders any other fees or costs to be taxed, or certifies for costs in any case, or where the allowance of any particular costs under any of the sections of the Act, or any of the rules of Court, or under any other statutory provision, the application therefor should be made at, or immediately after the trial or hearing, or final disposal of the cause. The Judge may make such direction or order on his list, at the time of the trial, or on the back of the summons, or when the action is finally disposed of, in case of a postponed judgment. p. 373.

Officers' Fees.

296. The fees set forth in the tariff marked "Schedule of Clerks' fees" and "Schedule of Bailiffs' fees" shall be the fees to be received by the several Clerks and Bailiffs of Division Courts, on and after the day that these rules shall come into force, for and in relation to the duties and services to be performed by them as officers of the said Courts, and shall be in lieu of all other fees heretofore receivable for the same proceedings. p. 46.

297. The Clerk shall not be required to take any proceeding, unless and until the fee or fees therefor have been paid to him as provided by section 54 of the Act. pp. 48, 153.

298. In every case in which an attachment has issued against an absconding debtor, or an execution has issued against the property of a judgment debtor, and a plaintiff or defendant, judgment creditor or other person interested in the claim, judgment or execution, who would be entitled to the proceeds thereof (if the money were made in satisfaction of the attachment or execution), insists upon the Bailiff making an attempt to find property, whereby mileage and expenses are to be incurred, it shall be necessary for a deposit to be made with the Clerk of the amount of Bailiff's fees, and, provided a proper endeavor (although unsuccessful) has been made by the Bailiff after such deposit of fees, to the satisfaction of the Clerk, but subject to appeal to the Judge, to secure property whereon to levy in such case, he shall be entitled to such mileage. pp. 50, 387.

299. Before an order may be made for issuing an execution for the payment of fees which ought to have been paid to the Clerk in the first instance according to section 54, an application must be made to the Judge, upon affidavit of the facts, and a summons must issue for the party on whose behalf the proceedings upon which fees are alleged to be unpaid were taken, to show cause why payment thereof should not be enforced by order of the Judge and by execution as provided by section 55 of the Act. pp. 49. Forms 56, 130, 143.

Postage and Registration of Letters.

300. All letters enclosing any papers in a cause sent from one Division Court officer to another, or to a party to a suit, or to the Judge, and unless otherwise provided for in the Act or by these rules, all necessary notices sent by the Clerk, shall be prepaid and registered; when papers are forwarded to the Judge, postage stamps for return postage must in all cases be enclosed. The costs of postage and registration shall in all cases be costs in the cause. pp. 169, 206, 373.

Appeals from Division Courts.

301. In case of an agreement not to appeal (section 116) a memorandum of such agreement, in writing, shall be prepared and shall be signed by the parties, their solicitors or agents, and be filed with the Clerk before the trial is entered upon. p. 212. Form 192.

302. When the Judge of the Court of Appeal has pronounced judgment either party may deposit the same, or an office copy thereof, with the Clerk of the Division Court, and upon being so deposited the judgment must be filed, and may be enforced as if it had been made by such Division Court. p. 305.

303. A new trial in pursuance of the order of the Judge of the Court of Appeal, shall be entered for trial at the Division Court which shall be holden next after twelve clear days from the time when such order, or office copy thereof, shall have been deposited as aforesaid, unless the parties agree that it shall take place sooner, or the Judge otherwise order, and it shall be conducted in the same manner as any new trial granted by the Division Court itself. p. 305.

304. If the order of the Judge of the Court of Appeal be that judgment shall be entered for either party, then such judgment shall be entered accordingly, and the successful party shall be at liberty to proceed on such judgment as on a judgment of the Division Court. p. 305.

APPEALS.

Under Master and Servant Act (R.S.O. cap. 139), and amendments thereto, and under the "Act to impose a Tax on Dogs for the protection of Sheep," (R.S.O. cap. 214) and other Acts.

305. Appeals may be made by master or servant:

- (1) Against any conviction or order for the payment of wages;
- (2) Against any order of dismissal from service or employment, or;
- (3) Against any decision of any Justice under the Act. The complaint before the Justice in all cases being laid by the servant. [See appendix].

306. The forms, Nos. 247 to 250 inclusive, shall be used and applied in proceedings on appeals to the Division Court, under *The Act Respecting Master and Servant*, (R.S.O. cap. 139, and amendments thereto), being varied where necessary to meet the particular case. [See appendix.]

307. The said forms may also be used and applied, being varied for that purpose, in proceedings on appeals to the Division Court, under "*The Act to impose a Tax on Dogs for the protection of Sheep.*"

308. The said forms may also be used and applied, being varied for that purpose, in proceedings on appeals to the Division Court, under *The Consolidated Assessment Act*, 1892, or under Acts amending the same. [Obsolete: see p. 254.]

309. The rules regulating the practice in appeals, under *The Ditches and Watercourses Act*, in so far as the same are applicable, and the practice is not provided for by the said *Consolidated Assessment Act*, shall govern appeals, under the said last mentioned Act.

MASTER AND SERVANT.

310. The appellant shall, before or at the time of the filing of the appeal bond, file with the Clerk the notice of appeal and an affidavit of service thereof. (R.S.O. cap. 139, sec. 16.) (See appendix).

311. The Clerk shall, on the bond and the notice of appeal with an affidavit of service thereof being filed in his office, enter the cause in his procedure book. p. 36.

312. The Clerk may require from the sureties to the appeal bond an affidavit of justification showing their sufficiency as such sureties.

313. The Clerk's approval of the bond and of the sufficiency of the sureties may be endorsed on such bond.

314. The appellant shall, at the time of the filing of the bond, furnish in writing, with the post office address of the Justice or Justices the Clerk, whose decision the appeal is made.

315. The Clerk shall give notice, by registered letter, to such Justice or Justices of the filing and approval of the bond.

316. If the appellant require the appeal to be tried with a jury, he shall, at the time of the filing of the bond, file a notice and deposit with the Clerk, the proper and necessary fees.

317. If the respondent requires a jury, he shall, within four days after the service of the notice of appeal upon him, file with the Clerk a notice requiring a jury, and shall at the same time deposit the proper and necessary fees.

318. The Clerk and Bailiff, respectively, shall be entitled to receive for their services the like fees as in suits in the Court, and the same and necessary disbursements shall be paid to the Clerk before any proceeding is taken. p. 253.

319. The Clerk may issue, under the seal of the Court, subpoenas to witnesses, and the Bailiff may serve the same; such subpoenas shall be in the form, as nearly as may be, of those used in suits in the Division Courts. p. 253.

LINE FENCES.

(See pp. 253, 254.)

(See *Appendix*).

320. The appellant shall deliver to the Clerk of the Division Court a copy of the notice of appeal, with an affidavit of the service thereof, upon the fence-viewers and parties interested, and a copy of the award, certified by the Clerk of the municipality.

321. The Clerk shall immediately notify the Judge of such appeal.

322. Upon receiving the Judge's order, appointing a time and place for the hearing of the appeal, the Clerk shall notify the fence-viewers and all parties interested, in the manner provided in *The Line Fences Act* for the service of notices.

323. If the time and place of hearing is at a sitting of the Division Court, the Clerk shall enter the matter on the Judge's list of causes for trial at such sitting, and at the foot of such list, unless the Judge shall otherwise order.

324. The Clerk may issue, under the seal of the Court, subpoenas to witnesses, and the Bailiff may serve the same. Such subpoenas shall be in the form, as nearly as may be, of those used in suits in the Division Courts. p. 253.

325. The Clerk and Bailiff shall, respectively, be entitled to receive for services the like fees as in suits in the Court, and the same and necessary disbursements shall be paid to the Clerk before any proceeding is taken. p. 253.

326. Rule No. 138 of these rules, as to preparation of special judgment, shall be applicable to matters under *The Line Fences Act*. p. 278.

327. After the Judge has finally determined the appeal and made his order, the Clerk shall certify to the Clerk of the municipality the said order, and the award as altered or confirmed, together with the costs, if any, allowed, and by whom to be paid.

328. In case a sum of money has been paid by the appellant to the Clerk as an indemnity against the costs of the appeal, such Clerk shall hold the same, subject to the Judge's directions.

329. The Forms Nos. 244 to 246 inclusive, shall be used and applied in proceedings on appeals to the Judge of the County Court, under *The Line Fences Act*. (R.S.O. cap. 219, sec. 12.) Where necessary the forms can be varied to suit the particular case.

DITCHES AND WATERCOURSES.

(See notes, *ante* pp. 253, 254.)

330. Immediately upon receiving from the Clerk of the municipality the copy of the notice or notices of appeal and the certified copy of the award, the Clerk shall notify the Judge, of the appeal.

331. Immediately upon the receipt of the Judge's order fixing the time and place of hearing the appeal, the Clerk shall notify the engineer and all parties interested, in the manner provided in *The Ditches and Watercourses Act* for the service of notices.

332. If the time and place of hearing is at a sitting of the Division Court, the Clerk shall enter the matter on the Judge's list of causes for trial at such sitting, and at the foot of such list, unless the Judge shall otherwise order.

333. The Clerk may issue, under the seal of the Court, subpoenas to witnesses, and the Bailiff may serve the same. Such subpoenas shall be in the form, as nearly as may be, of those used in suits in the Division Courts. pp. 253, 254.

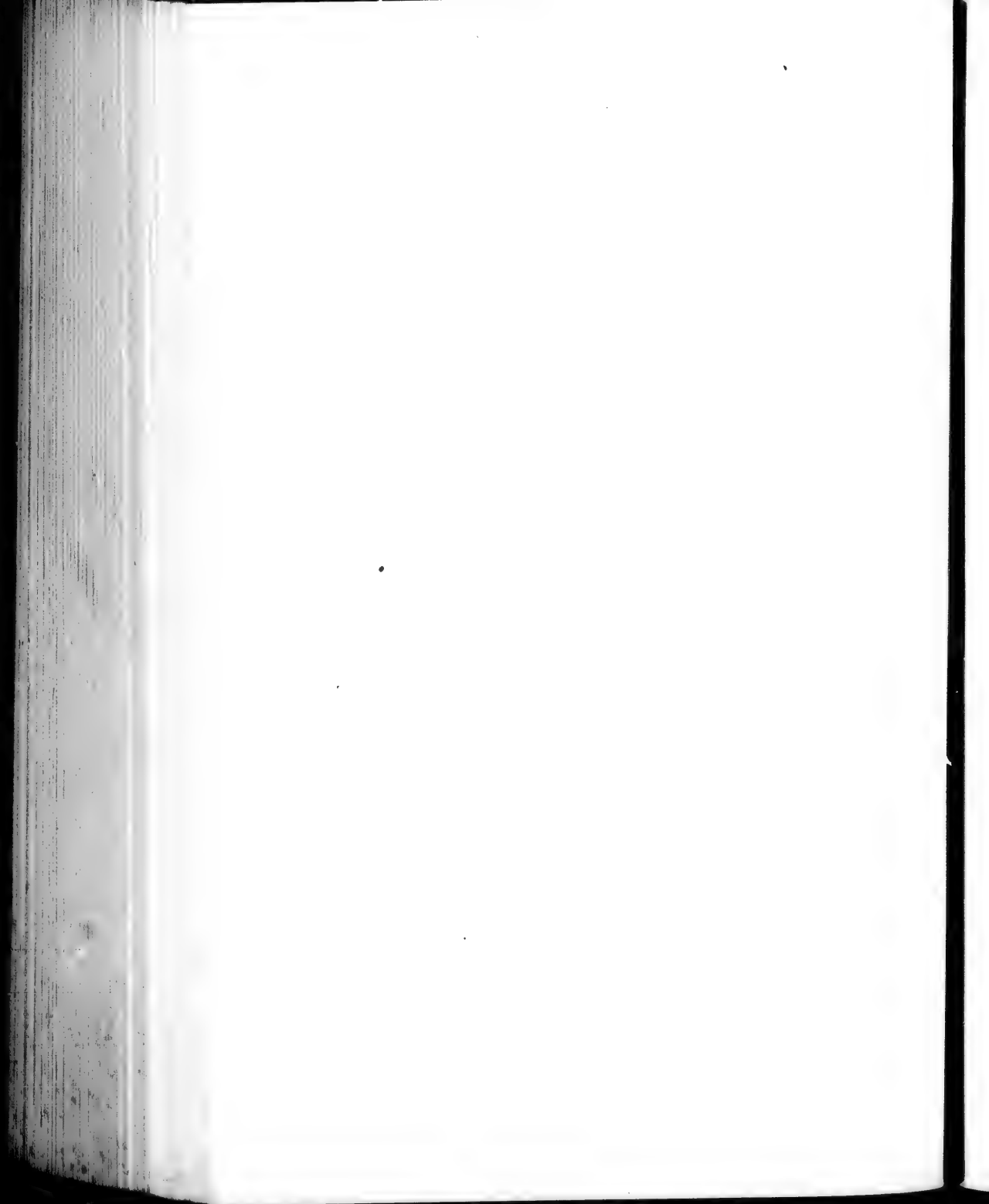
334. The Clerk and Bailiff shall, respectively, be entitled to receive for services the like fees as in suits in the Court, and the same, and necessary disbursements shall be paid to the Clerk before any proceeding is taken. p. 253.

335. Rule No. 138 of these rules, as to preparation of special judgment, shall be applicable to matters under *The Ditches and Watercourses Act*. (Obsolete; p. 278: see R.S.O. c. 285, s. 26.)

336. After the Judge has finally determined the appeal and made his order, the Clerk shall certify to the Clerk of the municipality the said order, and the award as altered or confirmed, together with the costs, if any, allowed, and by whom to be paid.

337. In case a sum of money has been paid by the appellant to the Clerk as an indemnity against the costs of the appeal, such Clerk shall hold the same, subject to the Judge's direction.

338. The Forms Nos. 240 to 243, inclusive, shall be used and applied in proceedings on appeals to the Judge of the County Court, under *The Act respecting Ditches and Watercourses*. (R.S.O. cap. 220, and amendments thereto.) Where necessary the forms can be varied so as to suit the particular case.



DIVISION COURT FORMS.

UNAUTHORIZED FORMS AND PROCEEDINGS.

All proceedings, books, and documents must be in forms similar to the forms to these rules appended, where the same are applicable, and no printed forms may be used by any clerk or bailiff unless in accordance with the forms appended to these rules, and if an unauthorized form be used no fee shall be payable to the officer in respect thereof. In cases where no forms are provided, parties must frame the proceedings or documents, using as guides those appended to these rules : Rule 242.

The forms numbered from 1 to 253 are the authorized forms, and no printed form may be used unless in accordance therewith.

The additional forms have been framed in accordance with the rule, the authorized forms being used as guides. Great care has been exercised in order that they may be as reliable as possible.

As a matter of convenience, references to the sections or notes applicable have been appended to each form.

TARIFF.

Form 1.

The tariff prescribes all that the clerk or bailiff has any right to take: *Dartnell v. Quarter Sessions of Prescott and Russell*, 26 U.C.R. 430. No judge can allow more than the tariff prescribes: section 312; Rule 296; *ante* p. 46. If the work provided for by the tariff is not done, no fees can be allowed therefor.

In *Ross v. McLay*, 26 C.P. 199, Sir Thomas Galt said: "It is sufficient to say that he (the clerk) has charged the plaintiff for services which he did not render, and therefore the charges must be disallowed." The amount provided for by the tariff cannot be exceeded in any case: *Re Totten*, 8 P.R. 386.

Item 7 of the old tariff was "Entering and noting every defence or notice of admission in procedure book, 25 cents." No fee will hereafter be chargeable for this service.

CLERK'S FEES.

1. Receiving claim, numbering and entering in procedure book.... \$0 15

(This item to apply to entering in the procedure book a transcript of judgment from another court, but not an entry made for the issue of a judgment summons.)

2. Issuing summons, with necessary notices and warnings thereon, or judgment summons (as provided in the forms), in all:

Where claim does not exceed \$20.....	40
“ exceeds \$20 and does not exceed \$60.....	50
“ exceeds \$60 and does not exceed \$100.....	60
“ exceeds \$100.....	1 00

(N.B.—In replevin and interpleader suits the value of goods to regulate the fee.)

3. Copy of summons, including all notices and warnings thereon.. 25

The charge for copy of summons was formerly 20 cents.

4. Copy of claim (including particulars), when not furnished by plaintiff..... 25

The charge for copy of claim was formerly 20 cents, and was to be paid by the plaintiff. It is now costs in the cause.

5. Copy of set-off or counterclaim (including particulars), when not furnished by the defendant..... 25

(Note.—In either of the last two preceding items, the fees may be taxed against the party ordered to pay costs.)

The charge for copy of set-off or counterclaim was formerly 20 cents, and was to be paid by the defendant. It is now costs in the cause.

6. Receiving and entering bailiff's return to any summons, writ, or warrant issued under the seal of the court (except summons to witness and return to summons or papers from another division)..... 15

7. Taking confession of judgment..... 0 10
 (This does not include affidavit and oath, chargeable under item 8.)
8. Every necessary affidavit, if actually prepared by the clerk, and administering oath to the deponent..... 25
9. Furnishing duly certified copies of the summons and notices and papers, with all proceedings for purposes of appeal under section 151), as required by either party, per folio of 100 words..... 05
 This did not occur in the old tariff.
10. Certificate therewith..... 25
 This did not occur in the old tariff.
11. Certifying under the seal of the court and delivering to a judgment creditor a memorandum of the amount of judgment and costs against a judgment debtor, under The Creditors' Relief Act, or for any other purpose..... 25
 This did not occur in the old tariff.
12. Copies of papers for which no fee is otherwise provided, necessarily required for service or transmission to the judge, each..... 10
 If exceeding two folios, per folio..... 05
 The provision for an increased charge where the copies exceed two folios is new.
13. Every notice of defence or admission entered, or other notice required to be given by the clerk to any party to a cause or proceeding, including mailing, but not postages..... 15
 The words " but not postages " are new.
14. Entering final judgment by clerk, on special summons, where claim not disputed..... 50
15. Entering every judgment rendered at the hearing, or final order made by the judge..... 50
 (Note.—This fee does not apply to any proceeding on judgment summons.)
 (This one fee of 50 cents will include the service of recording at the trial, and afterwards entering in the procedure book the judgment, decree, and order in its entirety, rendered or made at the trial. If a garnishee proceeding before a judgment, the fee of 50 cents will be allowed for the judgment in respect to the primary debtor, and a like fee of 50 cents for the adjudication, whenever made, in respect to the garnishee.)
16. Subpœna to witness..... 25
 (This subpœna may include any number of names therein, and only one original subpœna shall be taxed, unless the judge otherwise orders.)
 The amount was formerly 15 cents.

17. For every copy of subpoena required for service..... 0 05
 The words "including final order on judgment debtor's examination" are new.
18. Summons for jury (including copy for each jurymen), when required by the parties..... 1 25
 The clerk was formerly allowed 10 cents for each summons.
19. Calling and returning jury ordered by the judge..... 25
20. Every order of reference or order for adjournment made at hearing, and every order requiring the signature of the judge, and entering the same, including final order on judgment debtor's examination..... 25
 (Any warning necessary with order; *e.g.*, the warning in Form 73 forms part of the order.)
21. Transcript of judgment to another Division Court..... 25
 The words "to another Division Court" are new.
22. Transcript of judgment to the County Court..... 50
 Transcripts to County Courts are abolished: see sec. 230, pp. 394, 395.
23. Every writ of execution, warrant of attachment, or warrant of commitment and delivering same to bailiff..... 50
24. Renewal of every writ of execution, when ordered by the judgment creditor, or of warrant of commitment, when ordered by the judge..... 15
 The words "or of warrant of commitment when ordered by the judge" are new.
25. Every bond, when necessary, and prepared by the clerk (including affidavits of justification and of execution)..... 1 00
 The words "and of execution" are new. The item was formerly 50 cents.
26. For necessary entries in the debt attachment book, in each case (in all)..... 20
27. Transmitting transcript of judgment; or transmitting papers for service to another division, or to the judge, on application to him, including necessary entries and mailing, but not including postages..... 25
28. Receiving papers from another division for service, entering the same, handing to the bailiff, receiving and entering his return, and transmitting the same (if return made promptly, not otherwise)..... 30
29. Search, by person, not party to the suit or proceeding, to be paid by the applicant..... 10
 Search, by party to the suit or proceeding, where the suit or proceeding is over one year old. 10
 (No fee is chargeable for search to a party to the suit or proceeding, if the same is not over one year old.)

30. Taxing costs in defended suits after judgment pronounced.....	25
The words "after judgment pronounced" are new.	
31. Making out statement of costs in detail (including bailiff's fees) at the request of any party, or for purpose of settlement, or upon entering judgment by default.....	10
(Neither item 30 or 31 applies to statement of costs endorsed on summons or copy to be served.) See Rules 174, 175. Item 31 applies only to the statement of fees when demanded under Rule 175.	
32. Taxing bailiff's costs under section 7 of The Division Courts Act, 1889.....	25
This item refers to the taxation of bailiff's fees when goods are taken out of his hands by a sheriff under The Creditors' Relief Act: see section 241, <i>ante</i> p. 418.	
33. Copying and transmitting to municipal clerk judge's decision in appeal.....	50
This refers to appeals under The Line Fences Act: see Rule 327. See notes to section 139, <i>ante</i> pp. 253, 254; see also notes on "Special Judgments," <i>ante</i> pp. 277, 278.	

Form 2.**BAILIFF'S FEES.**

1. Service of summons issued under the seal of the court, or judge's summons or order, on each person (except summons to witness and summons to juryman):	
Where claim does not exceed \$20	\$0 30
" exceeds \$20 and does not exceed \$60	40
" exceeds \$60 and does not exceed \$100	50
" exceeds \$100	75
(In interpleader suits the value of the goods to regulate the fee.)	
2. For every return as to service under item 1; attending at the clerk's office and making the necessary affidavit (as provided by Rule 90)	15
A fee for return would not be allowable unless service had been effected.	
3. Service of summons on witness or juryman, or service of notice	15
4. Taking confession of judgment and attending to prove	10
5. For calling parties and their witnesses at the sittings of the court in every defended case, and at the hearing of every judgment summons	15
6. Enforcing every writ of execution, or summons in replevin, or warrant of attachment, or warrant against the body, each:	
Where claim does not exceed \$20	50
" exceeds \$20 and does not exceed \$60	75
" exceeds \$60	1 00
(When goods replevied the value of the goods to regulate the amount of the fee.) This fee does not include service of summons in replevin on defendant.	

Fees under Creditors' Relief Act (see section 7 of 52 Vict., c. 12, and section 25 of R.S.O. c. 65) shall be taxed according to this tariff. See now R.S.O. c. 78, s. 25, ante pp. 410, 411.

7. Every mile necessarily travelled to serve summons, or process or other necessary papers, or in going to *replevy goods*, or to seize on attachment, or in going to seize on a writ of execution, where money paid on demand, or made on execution, or case settled after seizure..... 12

The words in italics are new. The former item also contained the following clause: "In no case is mileage to be allowed for a greater distance than from the clerk's office to the place of service or seizure." Rule 298 entitles a bailiff to mileage where a creditor has insisted upon the bailiff making an attempt to find property, and a proper endeavor has been made by the bailiff after deposit of his fees has been made by the creditor. No assistant of the bailiff would be entitled to maintain an action or proceeding for such fees: *Smith v. Broadbent*, (1892: 1 Q.B. 551. No mileage is allowable for any unsuccessful attempt to serve a summons or other paper, or for an unsuccessful attempt to replevy goods; Rule 290 not extending to these cases. Mileage must in all cases be computed by the nearest travelled road to the place where service is effected: *Martin v. Corporation of Haldimand*, 19 U.C.R. 178; *Myers v. London & S.W. Ry. Co.*, L.R. 5 C.P. 1. If two papers should be served upon the same defendant in *different suits*, mileage would be chargeable on each. If three defendants in the same suit should live near one another, and should all be served on one journey, only the mileage to the place where the one farthest away was served would be allowable: *Re Davidson and Chairman Quarter Sessions of Waterloo*, 24 U.C.R. 66.

8. Mileage going to arrest under a warrant, when arrest made, per mile..... 12
9. Mileage carrying delinquent to prison, including all expenses and assistance, per mile..... 20
10. Every schedule of property seized, attached or replevied, including affidavit of appraisal, when necessary:
- | | |
|--|----|
| Not exceeding \$20..... | 30 |
| Exceeding \$20 and not exceeding \$60..... | 50 |
| Exceeding \$60..... | 75 |
11. Every bond, when necessary, when prepared by the bailiff, including affidavits of justification and of execution..... 50
12. Every notice of sale not exceeding three, under execution or under attachment, each..... 15
13. Reasonable allowances and disbursements, necessarily incurred in the care and removal of property:
- | | |
|--|--|
| (a) If a bailiff removes property seized, he is entitled to the necessary disbursements in addition to the fees for seizure and mileage. | |
| (b) If he takes a bond, then to 50 cents, instead of disbursements, for removal of property. | |
- (If the bailiff removes the goods he is entitled to nothing more than actual disbursements. If he takes a bond (which he does for

his own convenience and to save the trouble incident to the removal of the goods) it seems he is entitled to 50c. in addition to the 50c. for the bond under item 11.)

- (c) If assistance is necessary in the seizure, or securing, or removal, or retaining of property, the bailiff is entitled to the disbursements for such assistance.
- (d) All charges for disbursements are to be submitted to the clerk for taxation, subject to appeal to the judge.
- (e) The bailiff must in all cases endorse a memorandum of all his charges on the back of the execution, or state them on a separate slip of paper, so that the clerk may conveniently tax the bailiff's charges for fees and disbursements.
- (f) The clerk is in all cases to sign the memorandum of his taxation and preserve it among the papers in the cause, together with the execution, for future reference, and thereby enable the clerk to certify the bailiff's returns properly.

Formerly the item read: "There shall be allowed to the bailiff for removing or retaining property seized under execution or attached reasonable and necessary disbursements and allowances to be first settled by the clerk, subject to appeal to the judge." It seems that the fees authorized by this rule could not be collected where the goods seized or attached were not the property of the debtor: *Newman v. Merriman*, 26 L.T. 397. In the English County Court the expenses might, in the discretion of the judge, be allowed to the bailiff: *Thomas v. Peek*, 20 Q.B.D., p. 727; but the special provisions under which such expenses may be allowed in England do not appear to have been re-enacted here.

14. If execution, or process in attachment in the nature of execution be satisfied, in whole or part, after seizure and before sale, whether by action of the parties or otherwise, the bailiff shall be entitled to charge and receive 3 per cent. on the amount directed to be levied, or on the amount of the value of the property seized, whichever shall be the lesser amount.

Formerly the item read: "There shall be allowed to the bailiff five per cent. upon the amount realized from the sale of property under any execution, but such percentage not to apply to any overplus thereon."

(But if execution be satisfied in whole or in part after seizure and before sale, the bailiff to be entitled to charge and receive three per cent. on the amount realized.)

Compare C.R. 1190. It is only where the execution is "satisfied" in whole or in part that the allowance of three per cent. in lieu of poundage can be allowed. On an assignment for the benefit of creditors the execution could not be said to be satisfied. It is superseded. And it would seem that the percentage could not be allowed. If the goods are handed over to a sheriff under The Creditors' Relief Act (see pp. 411, 418, *ante*), it would also seem that the costs and disbursements of the bailiff would not include the percentage, as the sheriff would be entitled under section 28 of that Act to poundage: see *R. v. Ludmore*, 13 Q.B.D. 415.

By section 241, the bailiff has a lien for his fees where the action is settled or an assignment for the general benefit of creditors is made: see pp. 411 and 418, *supra*.

15. Poundage on executions, and on attachments in the nature of executions, 5 per cent., exclusive of mileage for going to seize and sell, upon the amount realized from property necessarily sold.

The property must be necessarily sold.

Form 3**FEES TO WITNESSES AND APPRAISERS.**

(See pp. 251, 252, 254.)

Allowance to Witnesses.

Attendance, <i>per diem</i> , to witnesses residing within 3 miles of the place where the court is held, if within the county.....	\$0 75
And if without the county	1 00
Attendance, if witness resides over 3 miles from the place of sittings, and within the county, <i>per diem</i>	1 00
Attendance, if witness resides without county and more than 3 miles from the place of sittings, <i>per diem</i>	1 25
Barristers and solicitors, physicians and surgeons, engineers and veterinary surgeons, other than parties to the cause, when called upon to give evidence of any professional service rendered by them, or to give professional opinions, <i>per diem</i>	4 00

(Note.—Disbursements to surveyors, architects and professional witnesses, such as are entitled to specific fees by statute, are to be taxed, as authorized by such statute: see p. 252 *ante*.)

If witnesses attend in one case only, they will be entitled to the full allowance.

If they attend in more than one case, they will be entitled to a proportionate part in each cause only.

The travelling expenses of witnesses, over three miles, shall be allowed according to the sums reasonably and actually paid, but in no case shall exceed twenty cents per mile, one way.

Section 140, *ante* p. 254, may now be considered not in force.

FEES TO APPRAISERS.*Fees of Appraisers of Goods, etc., Seized under Warrant of Attachment.*

To each appraiser, 50 cents per day, during the time actually employed in appraising goods, to be paid in the first instance by plaintiff, and allowed in the costs of the cause: see section 56 (2) *ante* p. 46.

FEES IN SUITS UNDER \$10.

See section 57, *ante* pp. 46-49.

Clerk.

For all services, from entering action, or suing out a judgment or interpleader summons, up to and including the entering of final judgment, or final order on any such judgment, or interpleader summons, in case the action proceeds to judgment or final order.....	\$1 25
--	--------

In case the action does not proceed to judgment or final order, the fees heretofore or that may hereafter be payable, but not exceeding in the whole the said sum.

For issuing writ of execution, warrant of attachment, or warrant for arrest of delinquent, and entering the return thereto....	50
---	----

Bailiff.

For all services rendered in serving summons and making return, and any other service that may be necessary, before judgment is entered by the clerk or pronounced by the judge, mileage excepted.....	40
---	----

For enforcing execution, schedule of property seized or attached, bond where necessary, and all other necessary acts done by him, after seizure, mileage excepted, if money made, or case settled after levy	1 00
---	------

(Necessary disbursements incurred in the care and removal of
property shall be allowed, to be first allowed by the clerk, subject
to the approval of the judge.)

5. FORM OF DEBT ATTACHMENT BOOK.

Name of Primary Creditor or Plaintiff.	Name of Primary Debtor or Defendant	Date of judg- ment, if claim a judgment.	Amount unadjudged, if claim a judgment.	Amount found due to Primary Debtor Creditor, when claim not a judgment.	Name of Garnishee.	Date of attach- ing order or garnishee summons.	Date of service of attaching order or garni- shee summons.	Amount ad- judged against garnishee.

BOOK.

Suitors' money paid out of the EXPENDITURES.
for the commencing Division Court in the County of
189 .

When paid out.	Style of Cause.	No. of Suit and Year.	To whom paid or how remitted.	Amount.
April 2	Bird v. Fish	100, 1893	Plaintiff	\$94 48

CASH

y of

er.	Amount.
...	\$94 48

15. Entering every judgment rendered at the hearing	50
16. Subpoena to Witness	25
17. For every copy of Subpoena	5
18. Summons to Jurymen, and copies	5
19. Calling Jury ordered by Judge	1 25
20. Every order of reference or other order	25
21. Transcript of Judgment to another Division	25
22. To County Court	50
23. Every Writ of Execution or Warrant	50
24. Renewal of every Writ of Execution, etc	15
25. Every Bond, when necessary, etc	1 00
26. For necessary entries in the Debt Attachment Book (in all)	20
27. Transmitting, etc	25
28. Receiving papers from another Division	30
29. Searches	10
30. Taxing costs after judgment	10
31. Making out statement of costs	25
32. Taxing Bailiff's costs	10
33. Copying and Transmitting Judge's decision to Municipal Clerk	25
Total	50

NOTE.—The No. in the left hand column refers to the No. in the Schedule of Clerk's Fees, where the items are given in full.

8. INDEX. FORM OF JUDGMENT DEBTOR'S BOOK.

NAME OF DEBTOR. (Surname first.)	Date when the Exam- ination took place.	Number and the style of the cause in which he was examined.
Brown Henry	16th January, 1893	306, 1891, Hibbert <i>v.</i> Brown.
Brawberg, Joseph	4th March, 1893	39, 1891, Filchett <i>v.</i> Brawberg.
Benson, Patrick	16th February, 1893	41, 1893, Platt <i>v.</i> Benson.

9. FORM OF ORDER BOOK.

DATE, 189 .	(If Cause existing or Judg- ment signed.) Style of Cause.	Process of proceed- ing to be issued or taken.	Signature of Party or Solicitor.
Jan. 12th, 1893.	Smith <i>v.</i> Jones, No. 76, '93	Issue execution.	H. Smith.
Feb. 6th, " "	Henry <i>v.</i> Jeffrey, " 17, "	Issue subpoena.	B. Henry.
" 9th, " "	Jackson <i>v.</i> Jones, " 29, "	Enter judgment.	B. Bell, Soli.
" 10th, " "	Peter <i>v.</i> Bray, " 14, "	Issue alias ex'n.	Geo. James, Agent.

Signature of
Party or
Solicitor.

Smith.
Henry.
Bell, Soli.
. James,
Agent.

Process Book of George Smyth, Bailiff of the 6th Division Court in the County of Elgin, made in pursuance of the Rule of the day Practice touching all Warrants, ¹⁸ ~~18~~ and Writs of Execution, acted on, or in hand, between the of 18, and the day of 18.

[illegible]

(See pp. 43, 52.)

12. BAILIFF'S FEE BOOK,

[illegible]

Or, For that the said C..... D....., by warranting a horse to be then sound and quiet to ride, sold the said horse to the said A..... B..... yet the said horse was not then sound and quiet to ride.

Or, For that the said C..... D....., in consideration that the said A..... B..... would supply E..... F..... with goods on credit, promised the said A..... B..... that he, the said C..... D....., would be answerable to the said A..... B..... for the same to the extent and value of \$75, that the said C..... D..... did accordingly supply the said E..... F..... with goods to the price of \$59 and upwards:—

Or, Butcher's meat supplied to you, full particulars entered in your pass book from time to time, from 27th August, 1889, to 12th September, 1890. \$24.75.

Or, Groceries supplied to you, full particulars in bills delivered weekly or monthly. (Dates as above.) \$28.49.

Or, Goods supplied to you out of my store, full particulars in detailed accounts given to you with each purchase. \$49.76: (see Rule 3, pp. 154, 183, 391, 465.)

(a) ON A GUARANTY.

A..... B....., of , in the County of , claims against C..... D....., of , in the County of , as principal, and against E..... F....., of , in the County of , as surety (or guarantor), \$100 for the price of goods sold by A..... B..... to C..... D.....

The following are the particulars:—

Guaranty by E..... F..... of the price of woollen goods supplied to C..... D..... as follows:—

1889, Febr'y 2, To goods	\$ 25 00
March 3, To goods	10 00
March 17, To goods	65 00
Total.....	\$100 00

(b) ON PROMISSORY NOTE AGAINST MAKER.

A..... B....., of , in the County of , claims against C..... D....., in the County of , as maker of a promissory note payable to E..... F..... or bearer (*or order, as the case may be*), of which plaintiff is the holder.

The following are the particulars:—

To promissory note, dated 1st January, 1890 (principal).. \$50 00
(interest).. 3 39

Total..... \$53 39

(c) ON A PROMISSORY NOTE AGAINST MAKER AND ENDORSER.

Same form of commencement as (a), *ante*, against C..... D....., of , in the County of , as maker, and E..... F....., of , in the County of , as endorser, of a promissory note (here state particulars as in form (b), *ante*),

(d) ON A BILL OF EXCHANGE AGAINST ACCEPTOR AND DRAWER.

A..... B....., of , in the County of , claims against C..... D....., of , in the County of , as acceptor, and against E..... F....., of , in the County of , as drawer of a bill of exchange.

The following are the particulars:—

Bill of exchange for \$75, dated 1st January, 1889, drawn by the said E..... F..... upon and accepted by the said C..... D..... payable three months after date.

Principal	\$75 00
Interest	2 75
Total	\$77 75

(e) ON A BILL OF EXCHANGE AGAINST ACCEPTOR.

A..... B....., of , claims of C..... D....., of , in the County of , as acceptor of a bill of exchange.

The following are the particulars:—

Bill of exchange, drawn by Amos Bentley, indorsed to plaintiff, accepted by you, due this day, 17th June, 1890, for..... \$29 00
17th December, to interest, six month..... 87

Total	\$29 87
-------------	---------

(f) ON A BOND.

A..... B....., of , in the County of , claims of C..... D....., of , in the County of , \$79.40 for principal and interest due upon a bond due to A..... B.....

The following are the particulars:—

Bond dated 1st January, 1889, condition for payment to A..... B....., of \$70 on the 26th December, 1889.

Principal due	\$70 00
Interest	9 40
Total	\$79 40

(g) ON A COVENANT.

A..... B....., of , in the County of , (same as above form (e) substituting the word "covenant" for "bond") to A..... B.....

The following are the particulars:—

Deed dated 26th January, 1889, covenant to pay \$70 and interest to A..... B.....

Principal due	\$70 00
Interest	9 40
Total	\$79 40

15. PARTICULARS OF PLAINTIFF'S CLAIM IN ACTIONS OF TORT.

A..... B....., of , claims from C..... D....., of , \$60 for damages. For that said A..... B..... has suffered damages from personal injuries to the said A..... B....., and damages to his carriage and harness, caused by the said C..... D..... (or his servant) on the 15th January, 1892, negligently driving a wagon and horse on Talbot Street, Southwold.

Particulars of Expenses.

Charges of Dr. VanBuskirk, surgeon.....	\$25 00
Charges of Mr. Jones, carriage-maker.....	10 00
Charges of Robert McCully, harness-maker	5 00
	\$40 00
Personal injuries.....	20 00
The said A..... B..... claims.....	\$60 00

*Or, *For that the said C..... D..... deprived the plaintiff of and converted to his own use the following goods of his, viz.:*—

Sept. 10, 1889—One table cloth.....	\$ 3 00
—One piano.....	50 00
—A lot of chairs.....	7 00
Total.....	\$60 00

*Or, *For illegally distraining his goods at No. 67 Charles Street, Toronto.*

*Or, *For illegally arresting and imprisoning him at Colborne Street, Brantford.*

*Or, *For that the said C..... D..... did on or about the day of , A.D. 189 , at the Township of , unlawfully [break and injure a wagon of the said A..... B.....] or [falsely represent L..... O..... as fit to be trusted, the said C..... D..... at the same time knowing that the said L..... O..... was insolvent, whereby the said A..... B..... was induced to give him credit] or [assault and beat the said A..... B.....] (or as the case may be, stating the tort sued for in concise language).*

Any of the foregoing forms of particulars of causes of action may be used as forms for counterclaim, reversing the names of parties.

15 (a) PARTICULARS IN CASE OF DETINUE.

A..... B....., of , states that C..... D....., of , on the day of , A.D. 189 , unlawfully detained from the said A..... B..... his goods and chattels, that is to say, a horse named "Bob Foster," also a harness and sulky.

The said A..... B..... claims a return of the same or their value, and \$ for their detention.

16. PARTICULARS OF CLAIM IN ACTION FOR DAMAGES TO LANDS BY FLOODING.

(Applicable only to certain judicial districts under R.S.O. c. 85, sections 13 and 18, being "An Act respecting Damage to Lands by Flooding in the new Districts.")

(This form can only be used when the proceeding is by ordinary summons) (commencement same as in form ante 15).

1. For that the defendant constructed a drain and flooded four acres of the plaintiff's lands, being Lot No. , in the concession, and thereby has done damage to the plaintiff to the extent of \$20, of which damages the following are particulars:—

4 acres of land rendered useless \$10 00
 Value of crop of oats on the land..... 10 00

Total..... \$20 00

A..... B....., *Plaintiff.*

2. For that the defendant is a mill owner (or a person engaged in lumbering), and has caused damage to lands of the plaintiff by overflowing the same for the purpose of driving logs (or timber or a sawmill) to the amount of \$20, which he claims from the defendant. (See 52 Viet., chap. 16, sections 13 and 17.) (Now R.S.O. c. 85, ss. 13 and 18.)

17. FORM OF PARTICULARS OF CLAIM IN CASE OF A SUIT ENTERED UNDER SECTION 82, (NOW SEC. 85.)

(Same in all respects as forms 14 to 16, with the following conclusion: "And the plaintiff enters this suit and claims to have it tried and determined in this court, because the place of sitting thereof is the nearest to the residence of the defendant.")

18. PARTICULARS IN ACTIONS AGAINST A CLERK OR BAILIFF AND HIS SURETIES.

No. , A.D. 18 .

Henry Bray, of , claims of John Noakes, Clerk (or Bailiff) of the Division Court for the County of , and of E..... F..... of , and G..... L....., of (sureties for and parties with the said John Noakes to a covenant for the due performance of the duties of his said office), the sum of for moneys had and received by the said John Noakes as such Clerk (or Bailiff) as aforesaid, in a certain cause in the said Division Court, wherein the said Henry Bray was plaintiff, and one H..... S..... was defendant, to and for the use of the said Henry Bray, the payment whereof the said John Noakes unduly withholds. And also (stating in like manner any other similar claim [or the sum of for damages sustained by the said Henry Bray through the misconduct (or neglect) of the said John Noakes in the performance of the duties of his said office: For that on the day of , at (describe in ordinary language the neglect or misconduct, whereby the damage was occasioned.)].

(See pp. 150, 151.)

HENRY BRAY.

19. DEFENCES.

(Title of Court and Style of Cause.)

Take notice that I will admit, on the trial, the first, second, and third items of the plaintiff's particulars to be correct (or the signing or endorsement of the promissory note sued upon (or as the case may be), or,

Take notice that I dispute the claim of the plaintiff (or here specify all or any of the grounds of defence, statutory or otherwise, set forth in the form for clerk's notices).

Dated this day of , A.D. 189 . X. Y.

To the clerk of the court and to the said plaintiff.

(See pp. 188, 189.)

In actions against an executor or administrator:

- (1) The defendant does not admit, but denies the plaintiff's claim.
Or, (2) The defendant admits the plaintiff's claim, but not the assets.
Or, (3) The defendant admits assets, but not the plaintiff's claim.
Or, (4) The claim is barred by the Statute of Limitations.
Or, (5) Payment was made by deceased.
Or, (6) The claim is fraudulent in the following particulars:

(Here set out particulars briefly.)

Or, (7) The defendant is entitled to a set-off, of which the following are the particulars:—

(Here show particulars.)

Or, (8) The claim was released by deed dated the day of 189 .

Or, (9) Notice was given and assets distributed under Revised Statutes of Ontario, chapter 110. (Now R.S.O. c. 129.)

Particulars of the notice:

Advertisement in the *Chronicle* newspaper, of January 10th, 1890;
Toronto Mail, 5th January, etc.

(Here set forth the titles of the papers and dates of issue in which the advertisements were inserted.)

(Sgd.)

A.....B.....
Defendant.

(See pp. 279-283.)

20. SET-OFF.

(*Style of Cause.*)

In the Division Court in the County of
 No. , A.D. 18 .

(*Style of Cause.*)

Take notice that I intend to avail myself of the law of set-off, and at the hearing of this clause will claim a setoff against the plaintiff's demand, the particulars of which set-off are hereto annexed, *or* (hereunder written.)

Dated the day of , A.D. 18 .

To the above-named plaintiff and to the } CHARLES DYKE,
 clerk of the said court. } *Defendant.*

(See pp. 112, 115, 227, 490.)

21. COUNTERCLAIMS.

In the Division Court in the County of
 Between A.....B....., *Plaintiff*,
 and
 C.....D....., *Defendant*.

The promissory note was given as the consideration for a horse sold by the plaintiff to the defendant.

The plaintiff warranted the horse to be sound, but it was wholly unsound and of no value.

The defendant counterclaims damages for breach of warranty \$100.

The defendant disputes (or admits) the plaintiff's claim.

The plaintiff was indebted to one John Orr in \$100 on account of goods sold and delivered by the said John Orr to the plaintiff, a statement which is as follows, viz.:—

(Here copy the account.)

The plaintiff by writing assigned the said account to the defendant on the third day of June, 18 , before this suit.

The defendant counterclaims \$100.

The defendant has suffered damage by the plaintiff's breach of a contract for the sale and delivery, by the plaintiff to the defendant, of 100 tons of Pennsylvania cannel coal at \$5 per ton, F.O.B. at Port Stanley, by equal monthly deliveries over the first five months of 1892.

The April and May instalments were not delivered.

Particulars of the damage are as follows:—

Difference between the market price in April and May and the contract price, at \$2.50 per ton on forty tons=\$100.

The defendant counterclaims \$84 arising from the following facts:—

Downs & Company contracted with the plaintiff to erect certain buildings for him in the City of St. Thomas, at a schedule of prices, and to complete them by the 1st October, 1891. The plaintiff entered into possession of them. At that time there was due from the plaintiff to Downs & Company, in respect of the contract, a balance of \$84, and all conditions had been performed and all times had elapsed necessary to entitle Downs & Company to recover that sum from the plaintiff.

By deed of the 5th November, 1892, Downs & Company assigned to the defendant all their interest in the debt of \$84, and on the 6th November the defendant gave the plaintiff notice of the assignment, but the plaintiff never paid the debt.

The defendant says that the contract contained a clause, whereby it was provided that the plaintiff should complete the work by the 31st March, 1889, and in default thereof should pay the defendant \$2 for every subsequent day during which the work should remain unfinished, and it so remained unfinished for 31 days to the 1st of May, the defendant counterclaims \$62.

The plaintiff's claim is for a horse sold by the plaintiff to the defendant for \$75. The plaintiff warranted the horse to be sound and good to work, but it was unsound and balky.

The defendant in due time tendered the horse back to the plaintiff in liquidation of the debt, but the defendant refused to accept the horse or to cancel the sale or any part of the debt.

The defendant sold the horse at public auction for \$25 without warranty, that being the best price he could obtain for the horse, and counterclaims \$60, as an equitable defence, and for a breach of warranty, and for the keep of the horse and expenses of sale; and pays the \$15 into court.

On the 20th day of July, 1889, the plaintiff unlawfully assaulted, beat, and wounded the defendant, whereby he became sick, sore and injured, and was unable to follow his employment, and so remained for three weeks.

The defendant was obliged to employ a surgeon to heal his wounds, and to administer medicines during his sickness and thereby incurred expense.

The defendant counterclaims for \$60 damages.

The plaintiff claims wages for work done for the defendant under an entire contract to serve him during the five summer months of 1890, from the beginning of the spring work until the end of the harvest, at \$25 per

month and board and washing. Before the termination of the contract, the plaintiff, without leave of the defendant, wrongfully quitted work, and left his employ without cause.

The defendant was obliged to employ other workmen, and suffered loss by being obliged to pay larger wages to laborers during harvest time, and counterclaims for \$35.

(See pp. 110, 227, 490.)

AFFIDAVITS AND OATHS.

22. GENERAL FORM OF HEADING AND CONCLUSION OF AFFIDAVITS.

(*Except where otherwise given.*)

In the Fifth Division Court in the County of Brant.

Between AARON BURR, *Plaintiff*,
and

CHARLES C. DYKE, *Defendant*.

I, Aaron Burr, of Paris, in the County of Brant, cordwainer, make oath and say as follows:—

Sworn at Paris, in the County of
Brant, this day of
one thousand eight hundred and

Before me

Clerk.

(Signature.)

(See pp. 144, 170.)

23. AFFIDAVIT FOR LEAVE TO SUE A PARTY RESIDING IN AN ADJOINING DIVISION.

In the Division Court in the County of

I, A..... B....., of , Yeoman, (or I, E..... F....., of , Yeoman, agent for A..... B....., of, etc.,) make oath and say:—

1. That I have a cause of action against C..... D....., of , Yeoman, who resides in the Division, in the County of , (If by agent, "That the said A..... B..... has a cause of action against C..... D....., of , Yeoman.")

2. That I (or the said A..... B.....) reside in the Division, in the County of

3. That the distance from my residence (or from the said A..... B.....'s residence) to the place where this court is held is about miles, and to the place where the court is held in the Division in the County of is about miles.

4. That the distance from the said C..... D.....'s residence to the place where the court is held in the division where he resides is about miles, and to the place where this court is held about miles.

5. That the said division and this division adjoin each other, and that it will be more easy and inexpensive for the parties to have this cause tried in this division than elsewhere.

Sworn, etc. A..... B..... (or E..... F.....).

(See section 86, Rules 14, 22, p. 138.)

24. AFFIDAVIT FOR LEAVE TO SUE IN A DIVISION, ADJOINING ONE IN WHICH DEBTORS RESIDE, WHERE THERE ARE SEVERAL.

In the Division Court in the County of

I, A..... B....., of , Yeoman, make oath and say, (or E..... F....., of , Yeoman, agent for A..... B....., of, etc.,) make oath and say:—

1. That I have (or that the said A..... B..... has) a cause of action respectively against each of the debtors named in the first column of the schedule, on this affidavit indorsed.

2. That the columns in the said schedule, numbered respectively 1st, 2nd, 3rd, 4th, 5th, 6th and 7th, are truly and correctly filled up, according to the best of my knowledge and belief.

3. That the divisions named in the second and third columns of the said schedule, opposite each debtor's name, respectively adjoin each other.

4. That it will be more easy and inexpensive for the parties to have the said causes, respectively, tried in this division than elsewhere.

Sworn, etc. A..... B..... (or E..... F.....).

(See section 86, *ante* p. 138.)

25. SCHEDULE REFERRED TO IN THE WITHIN AFFIDAVIT.

COLUMNS.

1st	2nd.	3rd.	4th.	5th	6th.	7th.
Debtor's name, place of residence and addition.	Division in which suit is to be commenced.	Division in which debtor resides.	Number of miles from creditor's residence to where court held in division in which debtor resides.	Number of miles from creditor's residence to where court held in division in which suit to be commenced.	Number of miles from debtor's residence to where court held in division where suit to be commenced.	Number of miles from debtor's residence to where court held in division where debtor resides.
Jno. Doe, of Saltfleet, County of Wentworth, Yeoman.	Division No. 3 in the County of Lincoln.	Division No. 1 in the County of Wentworth.	22	1		17
Richard Roe, of Simcoe, County of Simcoe, Esquire.	Division No. 3 in the County of Simcoe.	Division No. 8 in the County of Simcoe.	2	11	18	4

A B (or E F).

26. AFFIDAVIT FOR ATTACHMENT AGAINST ABSCONDING DEBTOR.

(If made after suit commenced, insert style of court and cause.)

I, A..... B....., of the, in the County of (or, I, E..... F..... etc., agent for the said A..... B....., of, etc.), make oath and say:—

1. That C..... D....., of (or late of), in the County of, is justly and truly indebted to me (or to the said A..... B.....) in the sum of dollars and cents (the amount here stated must not exceed \$100, or be less than \$4. If the claim is for a sum in excess of \$100, such excess must be abandoned, unless the claim be for the recovery of a debt or money demand, the amount or balance of which does not exceed \$200, and the amount or original amount of the claim is ascertained by the signature of the defendant: see sections 70 and 249, 255) on a promissory note for the payment of dollars and cents, made by the said C..... D....., payable to me (or the said A..... B.....) at a day now past;

Or, For goods sold and delivered,	} by me (or the said A..... B..... to the said C..... D.....;
Or, For goods bargained and sold,	
Or, For money lent,	
Or, For money paid for the said C..... D.....	

Or, For and in respect of my (or the said A..... B.....) having relinquished and given up to and in favor of the said C..... D..... at his request, the benefit and advantage of work done, and materials found and provided, and moneys expended by me (or the said A..... B.....) in and about the farming, sowing, cultivating and improving of certain land and premises;

Or, For the use by the said C..... D....., by my permission (or by the permission of the said A..... B....., of messuages and lands of me (or the said A..... B.....);

Or, For the use by the said C..... D..... of pasture land of me (or the said A..... B.....), and the eatage of the grass and herbage thereon, by the permission of me (or the said A..... B.....);

Or, For the wharfage and warehouse room of goods deposited, stowed, and kept by me (or the said A..... B.....) in and upon a wharf, warehouse, and premises of me (or the said A..... B.....) for the said C..... D....., at his request;

Or, For horse meat, stabling, care, and attendance provided and bestowed by me (or the said A..... B.....) in feeding and keeping horses for the said C..... D....., at his request; or, for work done and materials provided by me (or the said A..... B.....) for the said C..... D....., at his request;

Or, For expenses necessarily incurred by me (or the said A..... B.....) in attending as a witness for the said C..... D....., at his request, to give evidence upon the trial of an action at law then depending in the Court, wherein the said C..... D..... was plaintiff and one E..... F....., defendant;

Or, For money received by the said C..... D..... for my use (or for the use of the said A..... B.....);

Or, For money found to be due from the said C..... D..... to me on an account stated between us (or to the said A..... B..... on an account stated between them) (or other cause of action, stating the same in ordinary and concise language. See form ante 14 for causes of action in matters of debt or contract.

2. I further say that I have good reason to believe, and do verily believe, that *the said C..... D....., with intent and design to defraud me (or the said A..... B.....) of my (or his) said debt, hath absconded from

this province, leaving personal property liable to seizure under execution for debt in the said County of *.

(Or instead of matter between the asterisks:)

The said C..... D..... is attempting to remove his personal property, liable to seizure under execution for debt, out of this province, or from the County of to the County of in this province, with intent and design to defraud me (or the said A..... B.....) of my (or his) said debt; (or, the said C..... D..... keeps concealed in the County of in this province to avoid service of process, with intent and design to defraud me) or the said A..... B..... of my (or his) said debt.

3. That this affidavit is not made by me, nor the process thereon to be issued, from any vexatious or malicious motive whatever.

Sworn, etc.

A..... B.....

(See section 257, ante pp. 438, 441.)

27. AFFIDAVIT FOR ATTACHMENT AGAINST AN ABSCONDING DEBTOR WHERE THE DEBT IS OVER \$100.

(Insert title of Court and Style of Cause.)

Commence as in the preceding form (26).

Insert after the words "indebted to me (or the said A..... B.....)" in the sum of one hundred and dollars (or two hundred dollars) for principal money on a promissory note (or the balance due on a promissory note) made by the said C..... D....., whereby he promised to pay to me (or the said A..... B.....) or bearer the sum of \$ at a day now past (if the note is payable to order, substitute for the foregoing words, "or bearer," the words "or order"), which note was duly transferred (or endorsed) to me (or the said A..... B.....), and is now due and unpaid.

[If the debt is a money demand other than a promissory note, state it according to the fact, as in Form (26)], but add that the amount of the said debt (or money demand), or the original amount, or the balance due thereon, does not exceed \$200 for principal money, and has been ascertained by the signature of the said C..... D..... (or of B..... K....., the person whom as executor (or administrator) the said C..... D..... represents). [Conclude as in the 2nd and 3rd paragraphs of the next preceding form.]

(See section 72 (3), ante pp. 83, 90, 438, 441.)

28. AFFIDAVIT OF SERVICE OF SUMMONS.

(Commence as in Form 22.)

I, Lachlin Weir, Bailiff of the First Division Court of the County of Oxford (or of the said court, or of the Third Division Court of the County of Kent), make oath and say:—That I did, on the day of

18....., duly serve the above-named defendant with a true copy of the summons, notices, and warnings therein, and indorsed thereon, and the

particulars of claim therewith in this cause, by delivering the same personally to the said defendant (or defendants) (or, if but one served, "to C..... D....., one of said defendants") (or, if the service was not personal, state how and on whom served), by delivering the same to his wife, or to his servant, or to one Henry Roe, who is a grown person and an inmate of and at the defendant's dwelling house or usual place of abode, trading or dealing (see section 99 of the Act), and that I necessarily travelled miles to make such service.

Sworn, etc.

V..... W....., Bailiff.

(See sections 100, 101, 103, ante p. 159.)

(Or this form may be used when the affidavit is endorsed on the summons:)

I swear that this summons and claim therewith were served by me on the day of , by delivering a true copy of both, personally, to the defendant (or to the wife or servant of the defendant, or to Henry Roe, a grown-up person, being an inmate of and at the defendant's dwelling house, or usual place of abode, trading or dealing), and that I necessarily travelled miles to do so.

Sworn, etc.

V..... W.....,
Bailiff.

N.B.—This affidavit must not be prepared in a perfunctory way. In all cases it must be prepared by the clerk, and with care, as to its correctness and amply complying with the statute in every respect.

29. AFFIDAVIT OF SERVICE OF SUMMONS ON AN ABSCONDING DEBTOR BY LEAVING COPY, ETC., WITH PERSON DWELLING AT HIS LAST PLACE OF ABODE.

(Commence as in Form 22.)

1. That I did on the day of , A.D. 18 , serve (naming him) the above-named defendant in this cause with the within (or "annexed") summons, notices and warnings therein, and the particulars of claim therewith in this cause, by delivering a true copy of each to and leaving them with (naming the person), at the last place of abode in this province, of the above-named defendant, and that at the time of such service the said (naming the person to whom papers delivered) was dwelling at the defendant's said last place of abode, and that I necessarily travelled miles to make such service.

Sworn, etc.

(See section 277, ante p. 465.)

30. AFFIDAVIT OF SERVICE OF SUMMONS ON AN ABSCONDING DEBTOR BY LEAVING COPY, ETC., AT LAST PLACE OF ABODE OR DWELLING OF DEBTOR, NO PERSON BEING THERE FOUND.

(Commence as in Form 22.)

1. That I did on the day of , A.D. 18 , serve (naming him) the above-named defendant in this cause with the within (or "annexed") summons, notices and warnings therein, and the particulars of claim therewith in this cause,* by leaving a true copy of each at the last place of abode and dwelling of the defendant in this province, and that at the time of so leaving them there no person could be there found, and that I necessarily travelled miles to make such service.

Sworn, etc.

31. AFFIDAVIT OF SERVICE OF SUMMONS ON AN ABSCONDING DEBTOR BY LEAVING COPY, ETC., AT HIS LAST PLACE OF TRADE OR DEALING.

(Commence as in last form down to asterisk* and proceed:)

By delivering a true copy of each to and leaving them with (naming the person) at the last place of trade and dealing of the above-named defendant in this province, and that at the time of such service the said (naming the person served) was dwelling at the defendant's said last place of trade and dealing, and that I necessarily travelled miles to make such service.

Sworn, etc.

(See section 277; Rule 35 (d).)

32. AFFIDAVIT OF EXECUTION OF CONFESSION.

(Commence as in form 22.)

I, _____, Clerk (or Bailiff) of the _____ Division Court, in the County of _____ (or of the said court), make oath and say:—That I saw the above (or annexed) confession duly executed by the defendant, and that I am a subscribing witness thereto, and that I have not received, and that I will not receive, anything from the plaintiff or defendant, or any other person, except my lawful fees, for taking such confession, and that I have no interest in the demand sought to be recovered in this action.

X..... Y..... (or V..... W.....).

Sworn before me, etc.

(See sections 211, 212.)

33. AFFIDAVIT FOR JUDGMENT SUMMONS UNDER THE PROVISIONS CONTAINED IN SECTION 235 (NOW SEC. 243).

(Title of Court and Style of Cause.)

I, _____, of the _____ of _____, in the County of _____ and Province of Ontario, _____, make oath and say:—

1. That I am the above-named plaintiff (or "the solicitor or agent" for the above-named plaintiff, as the case may be) in this cause.

2. That judgment was recovered in this cause on the _____ day of _____, in the year of our Lord, 189____, for the sum of _____ dollars, debt (or "damages" or "costs," as the case may be), and the sum of _____ dollars for costs of suit, and that the whole (or _____ dollars, "part") of the said judgment remains unsatisfied.

3. That I believe C..... D....., the defendant, sought to be examined herein, is able to pay the amount due in respect of the said judgment, or some part thereof (or "that C..... D....., the defendant, sought to be examined herein, has rendered himself liable to be committed to gaol under The Division Courts Act").

Sworn, etc.

A..... B.....

(See pp. 419, 422.)

34. AFFIDAVIT AGAINST A JUDGMENT DEBTOR UNDER SECTION 239. (NOW SEC. 246).

(Insert title of Court and Style of Cause.)

I, A..... B....., of _____ in the County of _____, Merchant, make oath and say as follows:—

1. That I am the plaintiff (or the solicitor or agent of the plaintiff) in this cause, and have a personal knowledge of the facts hereinafter set forth.

2. That the plaintiff recovered judgment against the defendant in this cause on the _____ day of _____, A.D. 18____, for the sum of _____ dollars, and _____ cents, which is still wholly (or partly) due and unpaid (state how much).

3. That the defendant was summoned and examined as a judgment debtor on the _____ day of _____, A.D. 18____, upon the application and at the suit of _____, being a creditor of the said defendant (or if of this plaintiff then state it), and after his said examination was discharged by the judge.

4. That the defendant resides in the County of _____

5. That the following facts which were not then before the court, upon the said examination, have since come to my knowledge (*here state the facts*).

6. That the said defendant did not at the said examination make a full disclosure of his estate, effects, and debts , because (*here state in what respect the defendant did not make such disclosure*), and the reasons for making this statement are (*here fully state the reasons of the deponent for making the allegation*).

Or, instead of the foregoing paragraphs, Nos. 5 and 6, state:

That since the said examination the said defendant hath acquired the means of paying the said judgment or some part thereof (*here state what the means were and how the deponent is aware of the facts stated as to the defendant having acquired such means*).

Sworn, etc.

A..... B

(See p. 424.)

35. AFFIDAVIT OF EXECUTION OF ANY INSTRUMENT.

(*Title of Court and Style of Cause.*)

I, O..... P....., of the, etc., make oath and say:—That on the day of , A.D. 18 , I was present and saw G..... H and K..... L..... (*as the case may be*) duly sign and execute the annexed award (*or bond or other instrument*).

That I know the said persons who so signed and executed the said , and I am a subscribing witness to the execution of the same by them respectively.

Sworn, etc.

36. AFFIDAVIT FOR REVIVAL OF JUDGMENT.

(*Title of Court and Style of Cause.*)

I, A..... B....., of the of , in the County of Yeoman, make oath and say as follows:—

1. On the day of , A.D. 18 , I recovered a judgment of this court, against the above-named defendant, for \$ debt (*or damages*), and \$ costs of suit.

2. No part of said moneys so recovered has been paid or satisfied, and the said judgment remains in full force (*or, the sum of \$, part only of said moneys, has been paid, and the judgment remains in full force as to the residue of the said moneys so recovered thereby*).

3. I am entitled to have execution of the said judgment and to issue execution thereupon for the sum of \$, as I verily believe.

Sworn, etc.

MENO.—If the affidavit be made by the plaintiff's attorney or agent, make the necessary alterations in the above form and add:—

4. I am the duly authorized attorney (*or agent*) of the plaintiff in this matter, and have a personal knowledge of the facts herein set forth.

Sworn, etc.

A..... B.....

(See pp. 5, 181, 297, 391, 392.)

37. AFFIDAVIT ON APPLICATION OF EXECUTOR OR ADMINISTRATOR TO
REVIVE A JUDGMENT.*(Insert title of Court and Style of Cause.)*

I, Aaron Barr, of, etc., make oath and say as follows:—

1. On the day of , A.D. 18 , the plaintiff, now deceased, recovered a judgment of this court against the defendant above named for \$ debt, and \$ costs of suit.

2. That no part of the said judgment so recovered has been paid or satisfied, and the said judgment remains in full force (or the sum of \$, part only of the said moneys, has been paid, and the said judgment remains in full force for the residue).

3. That I was (or Charles Fox, of the Town of , in the County of , Yeoman, was) on the day of , 18 , duly appointed the executor (or administrator) of the property of the said deceased plaintiff.

4. That I am, as such executor (or administrator), entitled (or the said Charles Fox as such executor or administrator is entitled) to have execution of the said judgment, and to have execution issued thereupon, as I verily believe, for the sum of \$.

Sworn, etc.

A..... B.....

(See Rules 139-143, pp. 5, 181, 297, 391, 392.)

38. AFFIDAVIT FOR REVIVAL OF JUDGMENT AGAINST AN EXECUTOR OR
ADMINISTRATOR.*(Insert title of Court and Style of Cause.)*

I, Aaron Barr, of the Town of St. Marys, in the County of Perth, Yeoman (if the affidavit be made by the plaintiff's solicitor or agent make the necessary alteration), make oath and say as follows:—

1. On the day of , A.D. 18 , I recovered a judgment of this court against the above-named George Raymond, since deceased, for \$ debt, and \$ costs of suit.

2. No part of said moneys so recovered has been paid or satisfied, and the said judgment remains in full force (or "the sum of \$, part only of the said moneys, has been paid, and the judgment remains in full force as to the residue of the said moneys so recovered thereby").

3. That William Bush, of the Township of Woodhouse, in the County of Norfolk, Yeoman, was duly appointed the executor (or administrator) of the property of the deceased.

4. I (or "the said plaintiff") am entitled to have execution of the said judgment, and to issue execution thereupon for the sum of \$, as I verily believe.

Sworn, etc.

A..... B.....

(See Rule 140, pp. 5, 181, 391, 392.)

39. AFFIDAVIT UNDER SECTION 217 (AS AMENDED BY SECTION 24,
DIVISION COURTS ACT, 1889) FOR FURTHER PROCEEDINGS
WITHOUT A JUDGE'S ORDER AFTER TRANSCRIPT
TO FOREIGN COURT.*(Title of Court and Style of Cause.)**(Commence as in other affidavits).*

1. That the judgment rendered in this cause remains unsatisfied in whole (or in part, as the case may be, showing how much remains unpaid).

2. That an execution issued out of the Division Court of the County of _____, to which a transcript was issued from this court, has been returned *nulla bona* [or that I believe the defendant has not sufficient goods in that division to satisfy the said judgment].

(*Jurat and conclusion as in other affidavits.*)

(See now Sec. 223 (2) p. 388.)

40. AFFIDAVIT OF DISBURSEMENTS TO SEVERAL WITNESSES.
No. 18.

(*Title of Court and Style of Cause.*)

I, A..... B....., of _____, the above plaintiff (or C..... D....., the above defendant, or E..... F....., agent or solicitor for the above plaintiff or defendant), make oath and say:—

1. That the several persons whose names are mentioned in the first column of the schedule at the foot hereof were necessary and material witnesses on my behalf (or on behalf of the said plaintiff or defendant), and attended at the sittings of this court on the _____ day of _____, as witnesses on my behalf (or on behalf of the said defendant or plaintiff), and that they did not attend as witnesses in any other cause (if otherwise, state the facts).

2. That each of the said witnesses necessarily travelled in going to said court and attending the said trial the number of miles respectively mentioned in figures in the second column of the said schedule opposite to the names of each of the said witnesses, respectively.

3. That each of the said witnesses was necessarily absent from his (or her) home in order so to attend the said trial the number of days set forth in the third column of the said schedule opposite the names of them respectively.

4. That the several and respective sums of money mentioned in figures in the third column of the said schedule, opposite to the names of the said witnesses, respectively, have been paid by me (or by the plaintiff or defendant) to the said witnesses respectively as in the said schedule set forth for their attendance and travel as witnesses in this cause. (*Conclude with jurat as in other affidavits.*)

(See p. 251.)

A..... B.....

SCHEDULE REFERRED TO IN THE FOREGOING AFFIDAVIT.

Names of witnesses.	Miles.	Absent from home.	Sums paid.
1	2	3	4

NOTE.—Where the party seeks to be allowed his own expenses for attendance, he must swear both that he was a necessary and material witness on his own behalf, and that he would not have attended the court except for the purpose of giving evidence in the case.

41. FORMS OF OATHS, ETC.

(a) To a witness at the trial who swears upon the Bible:

“The evidence you shall give to the court (and jury sworn), touching the matters in question between the parties, shall be the truth, the whole truth, and nothing but the truth. *So help you God.*”

(b) To a witness who swears with uplifted hand:—

Add to the foregoing after the last word "*truth*": "And this you do swear in the presence of the ever-living God, and as you shall answer to God at the great judgment day. *So help you God.*"

(c) To a Jew: He is to be directed to cover his head, the Pentateuch is to be opened and placed before him, then proceed as in the first form, only make use of the name "*Jehovah*" instead of "*God*."

(d) To a Quaker, Mennonist, or Tunker, or member of the church known as the *Unitas Fratrum* or United Brethren, or other person allowed by law to affirm:—

The witness is to be directed to repeat his name, after the clerk and the following: I, K..... L....., do solemnly, sincerely, and truly declare and affirm that I am one of the society called Quakers" (or Mennonists, Tunkers, or *Unitas Fratrum* or Moravians, *as the case may be*), after which, the affirmant repeating his name, "I, K..... L....., do solemnly, sincerely, and truly affirm and declare that the evidence I shall give to this court touching the matters in question," etc.

(e) To a person referred to in R.S.O. (1887), cap. 61, sec. 13 (now R.S.O. c. 73 ss. 12-15; *ante* p. 253.)

"I, M..... N....., do solemnly, sincerely, and truly affirm and declare that the taking of an oath is according to my religious belief unlawful; and I do also solemnly, sincerely, and truly affirm and declare," etc. (*as in form (d) above*).

(f) To an interpreter (where witnesses cannot speak English, or are deaf and dumb, or dumb):

"You shall truly interpret between the court (the jury), the parties in this cause, and the witness produced. *So help you God.*"

(g) To jury called by parties:—

"You and each of you shall well and truly try the matters in difference between the parties, do justice between them according to the best of your skill and ability, and a true verdict give according to the evidence. *So help you God.*"

(h) To jury called by the judge:—

"You and each of you shall well and truly try the facts controverted in this cause between the parties, and a true verdict give according to the evidence. *So help you God.*"

(i) To a defendant who appears upon a judgment summons:—

"You shall true answers make to all such questions as shall be put to you touching the subject upon which you have been now summoned to appear for examination, and what you shall state respecting the same shall be the truth, the whole truth, and nothing but the truth. *So help you God.*"

(j) To the officer who conducts a retiring juror out of court:—

"You shall retire with such jurors as have leave of absence from this court, you shall not speak to them yourself in relation to the subject of this trial, nor suffer any person to speak to them, and you shall return with them without unnecessary delay. *So help you God.*"

(k) To the officer when the jury retire to consider their verdict:—

"You shall keep every person sworn on this jury in some private and convenient place without meat or drink; you shall not suffer any person to speak to them, or speak to them yourself, except to ask them whether they have agreed on their verdict. *So help you God.*"

(l) To a deponent or affirmant making an affidavit or affirmation:—

"You do swear (or affirm) that the contents of this affidavit (or affirmation) to which you have subscribed your name (or made your mark) are just and true. *So help you God.*" (Or, "And so you solemnly, sincerely, and truly declare and affirm.")

(See pp. 252, 253.)

(m) OATH TO BE ADMINISTERED TO WITNESS BY ARBITRATOR OR UMPIRE.

"The evidence which you shall give before me as arbitrator (or umpire), touching the matters in difference in this reference, shall be the truth, the whole truth, and nothing but the truth. *So help you God.*"

(See p. 370.)

(n) JURAT TO AFFIDAVIT BY ILLITERATE OR BLIND DEPONENT.

Sworn by the above-named deponent, A..... B....., at the County of, on, and I certify that the affidavit was first read in my presence to said A..... B....., who seemed perfectly to understand the same, and wrote his signature (or made his mark) thereto in my presence.

X..... Y....., Clerk, etc.
Or as the case may be.

(o) AFFIRMATION BY QUAKERS, ETC., AND JURAT THERETO.

(Insert title of Court and Style of Cause.)

I, A..... B....., of, etc., do solemnly, sincerely, and truly declare and affirm that I am one of the society called Quakers (or Mennonists, Tunkers, *Unitas Fratrum* or Moravians, *as the case may be*), and I do also solemnly, sincerely, and truly declare and affirm as follows, that is to say (*state the facts*).

Solemnly affirmed at,
in the County of,
on, before me.

X..... Y....., Clerk, etc.
Or as the case may be.

42. AFFIDAVIT ON APPLICATION TO CHANGE THE VENUE.

(Insert Title of Court and Style of Cause.)

I, C..... D....., of, make oath and say:—

1. That I am the above-named defendant in this cause, and was served with the summons herein on the day of instant (or last past).

2. That I intend to defend this suit; that I have a good defence to this action upon the merits: that the cause of action herein did not wholly arise in the division in which this action is brought; and that the witnesses for the defence (or some of the witnesses for the defence) reside within the division in which I resided (or carried on business, or resided and carried on business, *as the case may be*) at the time this action was brought, namely: (*here set out the names and residences of such witnesses*); and that the application to be made herein is not to be so made for the purpose of delay.

3. That at the time this action was so brought I resided (or carried on business, or resided and carried on business, *as the case may be*) within the limits of the Division Court for the County of

and that the next two sittings of the said last-mentioned court will be held on the (*here give the dates particularly, and, if possible, the hour of opening of the court*), and that I desire to have this cause transferred to that court, and tried at one of such sittings.

Sworn, etc.

C..... D.....

[Should the affidavit be made by one of several defendants, or by a solicitor or agent, it can be easily adapted.]

(See section 90, *ante* pp. 142, 144.)

GARNISHEES.

43. AFFIDAVIT FOR ORDER TO GARNISH DEBT.

(*Insert title of Court and Style of Cause.*)

I, A..... B....., of the of in the county of the plaintiff in this suit (*if the affidavit be made by the plaintiff's solicitor or agent, make the necessary alteration*), make oath and say:—That judgment was recovered in the cause against the above named defendant on the day of A.D. 18....., for the sum of \$ debt and costs (*or according to the judgment, in case the judgment has been transferred to another court, here state the fact*). That the said judgment remains wholly unsatisfied (*or that \$ part thereof, yet remains unsatisfied*).

That I have reason to believe, and do believe, that E..... F....., who is residing at within this province, is (*or if the person indebted to the defendant be not known, say, "That one or more persons who are residing within this province, whom I am unable to name, are"*) indebted to the defendant in the sum of \$ (*or if the amount be unknown say, "In an amount which I am unable to name"*).

Sworn before me at the of
in the County of this
day of A.D. 18..... } A..... B.....

(See section 183, *ante* pp. 334, 335.)

44. GENERAL FORM OF HEADING AND CONCLUSION OF AFFIDAVITS IN GARNISHEE PROCEEDINGS.

In the Fifth Division Court of the County of Brant.

Between A..... B....., *Primary Creditor*,
and
C..... D....., *Primary Debtor*,
and
E..... F....., *Garnishee*.

I, G..... H....., of , make oath and say:—

Sworn at in the
County of this } [Signature.]
day of one thousand
eight hundred and
before me.

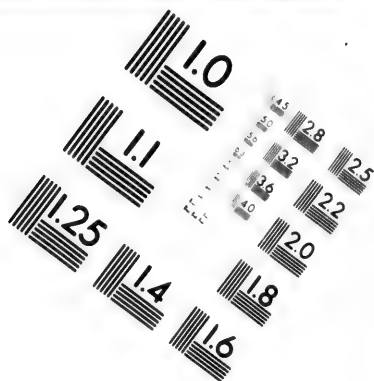
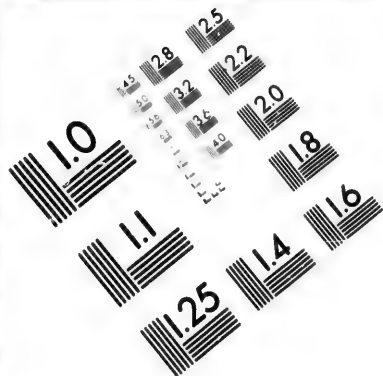
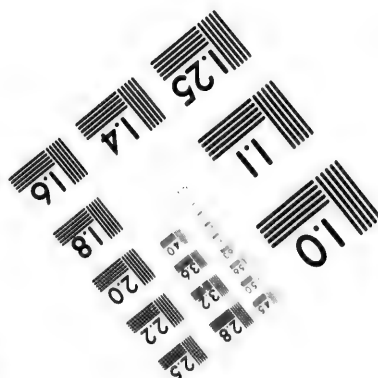
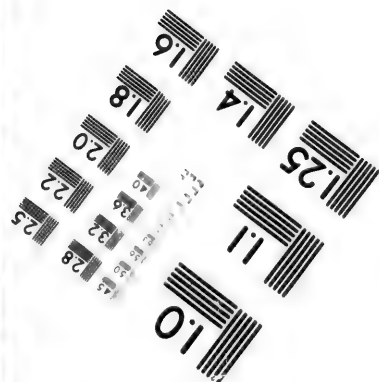
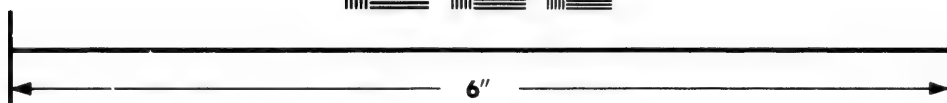
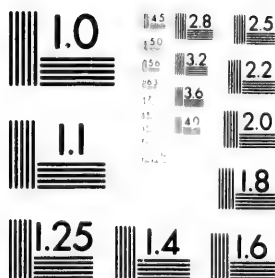


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SUMMONSES AND WARRANTS.

45. GENERAL FORM OF ALL SUMMONSES, SUBPENAS, WARRANTS, EXECUTIONS, AND OTHER PROCESS, UNDER THE SEAL OF THE COURT.

No. , A.D. 18 .

In the First Division Court in the County of York.

{ Seal. }

Between JOHN DOE, *Plaintiff*,

and

BENJAMIN FRANKLIN, *Defendant*.

To

Given under the seal of the court this tenth day of June, A.D. 18 .

R. ROE, *Clerk*.

46. In garnishee notices and proceedings, admissions, orders, and warrants, etc., change the foregoing (Form 45) as follows:—

No. , A.D. 189 .

In the First Division Court in the County of Brant.

Between AARON BURR, *Primary Creditor*,

and

{ Seal. }

CHARLES DYKE, *Primary Debtor*,

and

ELI FORBES, *Garnishee*.

(NOTE.—If another party added, insert “Geofrey Robertson, Claimant, added as a party.”)

Dated this day of , 18 .

Clerk.

(Or person sending notice or making admission or signing order.)

To

(The person to whom notice is sent.)

47. SPECIAL SUMMONS.

No. , A.D. 18 .

In the Division Court in the County of

{ Seal. }

Between HENRY BRAY, *Plaintiff*,

and

JOHN NOKES, *Defendant*.

To the above-named defendant:—

Take notice that the above-named plaintiff claims from you dollars, as shown by his particulars of claim herewith. If the amount of the claim with lawful costs be paid to the clerk of this court within days from the service hereof upon you, no further proceedings will be taken.

Unless within days after the service of this summons on you, you enter with the clerk of this court a notice in writing that you intend to dispute this claim, the clerk may enter judgment at his office and issue execution against you.

In case you give such notice disputing the claim, the cause will be tried at the sitting of this court to be held at _____, in the said County of _____, next after the expiration of _____ days from the time this summons is served on you, and the sittings of the court are set forth below.

Given under the seal of the court this _____ day of _____, A.D. 18 _____.

RICHARD ROE,

Clerk.

Claim.....\$
Costs, exclusive of mileage.\$

NOTICES AND WARNINGS TO THE DEFENDANT.

No. 1. If the defendant disputes the plaintiff's claim, or any part of it, he must leave with the clerk within _____ days after the day of the service hereof a notice to the effect that he disputes the claim, or, if not the whole claim, how much he disputes, in default whereof final judgment may be signed for the whole claim, or such part as is not disputed at any time within one month after the return of the summons, without prejudice to the plaintiff's right to recover for the remainder of the claim.

No. 2. If the defendant desires to set off any demand or counterclaim against the plaintiff at the trial or hearing of this cause, or to take the benefit of any statute of limitations or other statute, notice thereof in writing, together with particulars of the set-off or counterclaim, must be left with the clerk of the court and served on the plaintiff, or left at his usual place of abode, if he is living within the division, not less than five days before the day on which the cause will be tried, and in case the plaintiff does not reside within the division such notice and particulars must be left with the clerk for him.

No. 3. In case of tort or replevin where the sum or value of the goods or damages sought to be recovered exceeds \$20, and in all other cases where the amount sought to be recovered exceeds \$30, the defendant may have the action tried by a jury by giving notice in writing at the clerk's office five days after service of this summons on him, and on payment of fees for summoning the jury.

No. 4. On the day of trial the defendant must bring all the books and papers necessary to prove his case, or in any way connected with it or with his transactions with the plaintiff.

No. 5. Summonses for witnesses and for the production of documents may be obtained at the office of the clerk upon payment of the proper fee.

No. 6. The ensuing sittings of the court will be held as follows, viz.:
At _____ o'clock a.m. on Monday, the _____ day of _____, A.D. 18 _____, at
_____ o'clock a.m. on Tuesday, the _____ day of _____, A.D. 18 _____, etc.

(Here may be inserted the time of one or more subsequent sittings specifying the hour of the day of the week and month, plainly written in words at full length, and not expressed by figures or contraction of words.)

Endorse notice under section 98 (now 102) (Form No. 48).

(See pp. 35, 154, 131).

48. NOTICE REQUIRED TO BE ENDORSED UPON EVERY SUMMONS, BY
SECTION 98. (NOW SEC. 102.)

To the within-named defendant:—

Take notice that, in any case in which an order may be made changing the place of trial, application must be made therefor to the judge of this court within eight days after the day of service hereof (where the service is required to be ten days before the return), or within twelve days after the day of such service (where the service is required to be fifteen days or more before the return).

(See p. 158).

49. ORDINARY SUMMONS.

No. }	In the	Division Court in the County
A.D. 18 . }	of	
Between HENRY BRAY, <i>Plaintiff</i> ,		
and		
JOHN NOKES, <i>Defendant</i> .		

To the above-named defendant:—

Take notice that the above-named plaintiff claims from you dollars, as shown by his statement of claim herewith. Unless within days after the service of this summons on you, you enter with the clerk of the court a notice in writing that you intend to dispute the claim, it will be considered that you have no defence, and the said plaintiff may, at the sitting of this court next after the expiration of days from the time this summons is served on you, proceed to prove the amount of his claim against you, in your presence or absence. In case you give such notice disputing the claim, the cause will be tried at the sitting of this court to be held at , in the said County of , next after the expiration of days from the time this summons is served on you, and the sittings of the court are set forth below.

Given under the seal of the court this day of , A.D. 18 .

RICHARD ROE,
Clerk.

Claim.....\$
Costs, exclusive of mileage..\$

Add notices and warnings as in form for special summons (No. 47), except No. 1.

Endorse notice under section 98 (Form No. 48).

50. In case of an action against an executor or administrator where it is intended to charge him with a devastavit, add the following suggestion:—

(Commence with form of summons as in "Ordinary Summons," but naming defendant as executor or administrator, and adding after the words "against you" in the above) and the plaintiff alleges that you, the defendant, have money, goods, and chattels, which were the property of the said C..... D....., deceased, at the time of his death, and which came to your hands as such executor (or administrator) to be administered; and if not, that you have withheld or wasted the same.

(See pp. 35, 154, 187).

51. MEMORANDUM TO BE PUT ON ALL OTHER SUMMONSES.

On the day of trial the defendant must bring all the books and papers necessary to prove his case, or in any way connected with it or with his transactions with the plaintiff.

In cases of tort or replevin where the sum or value of the goods or damages sought to be recovered exceeds \$20.00, and in all other cases where the amount sought to be recovered exceeds \$30.00, and in all cases of interpleader, the defendant may have the action tried by a jury by giving notice in writing at the clerk's office five days after service of this summons on him, and on payment of fees for the expenses of the jury.

Summonses for witnesses and for the production of documents may be obtained at the office on payment of the proper fee.

52. WARNING TO BE ADDED TO THE PARTICULARS OR THE WARNINGS ON THE SUMMONS WHERE SUIT BROUGHT UNDER SECTION 239. (NOW SECTION 246).

"The defendant is informed and cautioned that I..... K..... (*insert the name of the beneficial plaintiff*) only has power to discharge this suit, the subject-matter thereof having been seized under execution."

53. SUMMONS TO EXECUTOR OR ADMINISTRATOR, WHERE PLAINTIFF INTENDS TO APPLY TO THE COURT, ALLEGING THAT ASSETS HAVE COME TO THE DEFENDANT'S HANDS SINCE JUDGMENT.

No. A.D. 18 .

In the Division Court in the County of

{ Seal. }

Between A..... B....., *Plaintiff*,
and

C..... D....., *Executor (or Administrator) of*
E..... F....., deceased,
Defendant.

The plaintiff having learned that property of the said deceased has come to your hands as executor (*or administrator*) since the judgment herein, to be administered, and that you have withheld and wasted the same, intends to apply at the sitting of this court to be held at , in the said County of , next, after the expiration of days from the time this summons is served on you, for an order that the debt and costs be levied of the goods and chattels of the said deceased, if you have so much thereof to be administered, and that, if you have not, then that it shall be levied of your own proper goods and chattels, and that the costs be levied of your proper goods and chattels.

You are, therefore, hereby summoned to appear at the said court, to answer touching the matter aforesaid. The sittings of the court are set forth below.

Given under the seal of the court this day of , 18 .

To

The above-named defendant.

Add warnings and notices as in the ordinary summons.

Add dates of sittings of court.

And endorse notice under section 98 (now 102).

(See pp. 181, 281, 282, & 2; Rule 97.)

54. SUMMONS TO DEFENDANT AFTER JUDGMENT.

No. , A.D. 18 .

In the Division Court in the County of
 { Seal. } Between A..... B....., *Plaintiff*.
 and
 C..... D....., *Defendant*.

To the above-named defendant:—

Whereas on the day of , A.D. 18 , the plaintiff duly recovered judgment against you in said court for \$ for debt, and \$ for costs of suit, which remains unsatisfied, you are therefore hereby summoned to appear at the next sittings of this court, to be held at , in the said County of , on the A.D. 18 , at the hour of o'clock in the noon, to be then and there examined touching your estate and effects, and the manner and circumstances under which you contracted the said debt (*or* incurred the damages *or* liability) which was the subject of the action in which the said judgment was obtained against you, and as to the means and expectations you then had, and as to the property and means you still have, of discharging the said debt (*or* damages *or* liability), and as to the disposal you may have made of any of your property. And take notice that if you do not appear in obedience to this summons, you may, by order of this court, be committed to the common gaol of the county.

Given under the seal of the court this day of , 18 .

By the court.

Amount of judgment.....\$

Costs of this summons.....\$

X..... Y.....
Clerk.

See pp. 419, 421; sec. 243.)

55. JUDGMENT SUMMONS AFTER DEFAULT.

No. , A.D. 18 .

In the Division Court in the County of
 { Seal. } Between A..... B....., *Plaintiff*.
 and
 [Stamp.] C..... D....., *Defendant*.

Whereas at the sittings of the court (*or* of, etc.), holden at the in the Town of of , in the County of , on the day of , 18 , the above-named plaintiff obtained a judgment against you for the sum of \$ for debt, besides interest thereon and \$ costs to be paid , and which said judgment remained unsatisfied.

And whereas by a summons bearing date the day of , 18 , you were summoned to appear at the sittings of this court, holden at the of , in the County of , on the day of , 18 , at the hour of of the clock in the forenoon, to be then and there examined by the judge of the said court, touching your estate and effects, and the manner and circumstances under which you contracted the said debt, which was the subject of the action in which the said judgment was obtained against you, and as to the means and expectations you then (at the time of contracting) had, and as to the property and means you still had (at the said last day aforesaid) of discharging the said debt, and as to the disposal you may have made of any of your property.

And whereas upon your appearing thereto, and upon examination and hearing of both parties (*or* of you, and the evidence, if any), it appeared,

to the satisfaction of the said judge, that you then had (or had since the judgment obtained against you, *as the case may be*) sufficient means and ability to pay the said debt and the interest thereon and costs so recovered against you; and the said judge did then and there order and direct that you should pay to the said plaintiff the sum of \$ debt, and interest then accrued, and \$ costs, and also \$ costs of the said last-mentioned summons, to be paid as follows, that is to say: the sum of \$ to be paid on the day of , 18 , the further sum of \$ to be paid on the day of 18 , or forthwith (*as the case may be*).

And whereas the plaintiff alleges that you have not paid the and instalments of each (or the said sums), so ordered to be paid.

You are therefore hereby summoned to appear at the next sittings of this court, to be holden at the in the Town of , in the County of , on the day of , 18 , at the hour of of the clock in the forenoon, to be then and there examined by the judge of the said court touching your estate and effects, and the manner and circumstances under which you contracted the said debt, which was the subject of the action in which the said judgment was obtained against you, and as to the means and expectations you then had, and as to the property and means you still have, of discharging the said debt, and as to the disposal you have made of any of your property, and as to the reasons why you have not paid to the plaintiff the said and instalments of each, of the said debt, so ordered to be paid by you, as last above mentioned and recited, pursuant to the said order of the judge.

And also to show cause why you should not be committed to the common gaol of the county for not complying with the said order of the said judge.

Given under the seal of the court this day of , 18 .

By the court,

X Y ,
Clerk.

Amount of judgment.....\$
" instalment.....\$
Cost of this summons.....\$

56. SUMMONS AT INSTANCE OF CLERK FOR PAYMENT OF FEES UNDER SECTION 55 (NOW SECTION 59.)

Insert title of Court and Style of Cause (if more causes than one, state the others).



To the above-named plaintiff (or to X G.):—

The clerk of this court demands of you the sum of \$ for the fees and costs of this suit, and you are hereby summoned to be and appear at the next sitting of this court to be holden at (*as the case may be*) in the said County of , on Monday, the day of , A.D. 18 , at the hour of 10 o'clock in the forenoon, and then and there to show cause why you should not be ordered by the judge to pay the said fees and costs, a statement of which is hereunto annexed; and which, according to the provision of the 54th (58th) section of The Division Courts Act, were payable in the first instance by you, but which you did not pay.

In the event of your not so appearing and showing cause why you should not pay the same forthwith, or of your not paying the same, an

order of the judge will be obtained and issued against you, under the 55th section of the Act, directing you to pay the same to the clerk, which will be followed and enforced by execution against your goods and chattels, or by such other ways and means as any debt or damages ordered by the court to be paid can be recovered. If you pay the same before the sittings of the court, no further costs will be incurred than the costs of this summons and the bailiff's fees for service hereof and mileage.

(Conclude as in other summonses.)

.....
Judge.

(See p. 49.)

57. SUMMONS TO JURORS.

{ Seal. }

In the Division Court, in the County of
You are hereby summoned to appear and serve as a juror in this
court, to be holden at on the day of , A.D.
18 , at the hour of a.m.; herein fail not at your peril.

Given under the seal of the court this day of , 18 .
X..... Y.....
Clerk.

To

(See pp. 90, 311.)

58. SUMMONS TO WITNESS.

(Insert title of Court and Style of Cause).

{ Seal. }

You are hereby required to attend at the sittings of the said court,
to be holden at , on Tuesday, the 7th day of July, A.D. 18 , at
the hour of in the forenoon, to give evidence in the above cause,
on behalf of the above named [and then and there to have and
produce (*state particular documents required*) and all other papers relating
to the said action in your custody, possession or power].

Given under the seal of the court this day of , 18 .
To X..... Y.....
Clerk.

(See p. 251.)

59. SUMMONS TO WITNESS TO APPEAR BEFORE ARBITRATOR.

{ Seal. }

(Insert title of Court and Style of Cause.)

You are hereby required to attend before , the arbitrator (or
arbitrators) to whom this cause stands referred, at on the
day of , A.D. 18 , at o'clock of that day, being the

time and place appointed by the said arbitrator for a meeting upon the said reference, to give evidence in the above cause on behalf of the above-named [and then and there to have and produce (*state the particular documents required*) and all other papers relating to the said action in your custody, possession, and power].

Given under the seal of the court this day of , A.D. 18 .

X Y ,

To

Clerk.

(See p. 370.)

60. ATTACHMENT AGAINST AN ABSCONDING OR REMOVING DEBTOR.

To A B , Bailiff of the Division Court, in the County of (or to A B , a constable of the County of , as the case may be):—

You are hereby commanded to attach, seize, take, and safely keep all the personal estate and effects of C D (*naming the debtor*), an absconding, removing, or concealed debtor, of what nature or kind soever, liable to seizure under execution for debt within the County of (*here name the county*), or a sufficient portion thereof to secure A B (*here name the creditor*) for the sum of (*here state the amount sworn to be due*), together with the costs of his suit thereupon, and to return this warrant, together with an inventory and appraisement of such property as you shall have attached, to the clerk of the (*here state the number of the division*) Division Court in the county aforesaid forthwith; and herein fail not.

Witness my hand and seal (*or the seal of the said court*) the day of , one thousand eight hundred and .

{ Seal. }

X Y ,

Clerk (*or Justice of the Peace, as the case may be*).

(See section 257.)

REPLEVIN.

61. AFFIDAVIT TO OBTAIN JUDGE'S ORDER FOR WRIT OF REPLEVIN.

In the Division Court, in the County of County of , I, A B , of , make oath and say:—
To wit:

1. That I am the owner of (*describe property fully*) at present in the possession of C D ; or that I am entitled to the immediate possession of (*describe property*) as lessee (bailiff or agent) of E F , the owner thereof (*or as trustee for E F*) (*or as the case may be*), at present in the possession of C D .

2. That the said goods, chattels, and personal property are of the value of dollars, and not exceeding sixty dollars.

3. That on or about the day of the said goods, chattels, and personal property were lent to the said C D for a period which has expired, and that although the said goods, chattels, and personal property have been duly demanded from the said C D , he

wrongfully withholds and detains the same from me, the said A.....B.....; or, that on or about the day of the said C.....D..... fraudulently obtained possession of the said goods, chattels and personal property by falsely representing that (*here state the false representation*), and now wrongfully withholds and detains the same from me: or, that the said goods, chattels, and personal property were on the day of distrainted or taken by the said C..... D..... under color of a distress for rent, alleged to be due by me to one E..... F....., when, in fact, no rent was due by me to the said E..... F..... (*or, as the case may be, setting out the facts of the wrongful taking or detention complained of with certainty and precision*).

4. That the said C.....D..... resides (*or carries on business*) at within the limits of the Division Court, in the County of (*or that the said goods, chattels, and personal property were distrainted*) (*or taken and detained*) (*or detained*) at , within the limits of the Division Court in the County of .

Sworn, etc.

(See Rule 43 (1), p. 95.)

62. AFFIDAVIT TO OBTAIN WRIT OF REPLEVIN WITHOUT JUDGE'S ORDER IN THE FIRST INSTANCE.

The first four sections may be as in last form, except that the third section must show that the property was wrongfully taken out of the possession of the claimant, or was fraudulently got out of his possession, and it will not be sufficient to show merely a wrongful detention of the property, and the following must be stated in addition:—

5. That the said personal property was wrongfully taken (*or fraudulently got*) out of my possession within two calendar months before the making of this affidavit, that is to say, on the day of last.

6. I am advised and believe that I am entitled to an order for the writ of replevin now applied for, and I have good reason to apprehend, and do apprehend, that unless the said writ is issued without waiting for an order the delay will materially prejudice my just rights in respect to the said property (*or if the property was distrainted for rent or damage feasant, the statement given in the last specific alternative under the 3rd clause of the above form will be sufficient to obtain the writ without order*).

(See Rule 43 (2), p. 95.)

63. CLAIM IN REPLEVIN.

No. , A.D. 18 .

In the Division Court, in the County of

A..... B....., of , states that C.....D....., of , did on or about the day of , A.D. 18 , take and unjustly detain (*or detain, as the case may be*), and still doth detain his goods, chattels and personal property, that is to say: (*here set out the description of property*), which the said A..... B..... alleges to be of the value of dollars, whereon he hath sustained damages, and the said A..... B..... claims the said property with damages on this behalf, as his just remedy.

A..... B.....

(See p. 97.)

64. SUMMONS IN REPLEVIN.

No. , A.D. 18 .

In the Division Court, in the County of

{ Seal. }

To Henry McPhail, the Bailiff of the said court, and to John Nokes:—

You, the said bailiff, are commanded that without delay you do take the security required by law and cause to be replevied to Henry Bray his goods, chattels, and personal property following, that is to say: (*Here set out the description of the property as in the affidavit filed*), which the said Henry Bray alleges to be of the value of \$ (here set out value as in the affidavit filed), in order that the said Henry Bray may have his just remedy in that behalf.

And you, the said John Nokes, are hereby required to take notice that a statement of the claim of the said Henry Bray is hereto annexed, and that unless within days after the service of this summons on you, you enter with the clerk of this court a notice in writing that you intend to dispute the claim, it will be considered that you have no defence, and the said Henry Bray may either cause judgment to be entered against you by default for \$2 and costs, or may, at the sitting of this court to be held at next, after the expiration of days from the time this summons is served on you, proceed in the action in the same manner as if you had appeared and had admitted his right to the possession of the goods.

The days of sittings of the court are set forth below.

Given under the seal of the court the day of , 18 .

DAVID B. JONES,
Clerk.

Claim for return of goods and damages. \$
Costs, exclusive of mileage..... \$

WARNING.

If you claim a right to the possession of the goods by reason of any claim which you may have to urge under any statute, or to take the benefit of any statute of limitations or other statute, notice thereof in writing must, not less than five days before the day on which the case will be tried, be left in the office of the clerk of the court and given to the said plaintiff, or left at his usual place of abode, if living within the division, and in case the said plaintiff does not reside within the division such notice shall be left with the clerk for him.

Ensuing sittings of the court will be held as follows, viz.:—

At 10 o'clock a.m.—

Tuesday, the 9th day of January, 18 .

Tuesday, the 6th day of March, 18 .

(Here may be inserted the time of one or more subsequent sittings.)

Add memorandum (Form 51).

Endorse notice under section 98 (now 102) (No. 48).

(See p. 96.)

65. REPLEVIN BOND.

Know all men by these presents that we, Henry Bray, of, etc., Robert Leslie, of, etc., and Horace Kilborn, of, etc., are jointly and severally held and bound to Henry McPhall, Bailiff of the Division Court, in the County of , in the sum of \$, to be paid to the said bailiff or his certain attorney, executors, administrators, or assigns, for which payment, to be well and truly made, we bind ourselves, and each and every of us in the whole, our and each, and every of our heirs, executors and administrators, firmly by these presents, sealed with our seals, and dated this day of , A.D. 18 .

The condition of this obligation is such that if the above bounden Henry Bray do prosecute his suit with effect, and without delay, against John Nokes for the taking and unjustly detaining (or unjustly detaining, as the case may be) of his cattle, goods, and chattels, to wit: (*here set forth the property distrained, taken or detained*), and do make a return of the said property, if a return thereof shall be adjudged, and also do pay such damages as the said John Nokes shall sustain by reason of the issuing of the writ of replevin, if the said Henry Bray fails to recover judgment in the suit (*if the goods were not taken under distress for rent or damage feasant, and if the case comes under the provisions of Rule No. , here insert*: and shall also indemnify and save harmless the said John Nokes from all loss and damages which he may sustain by reason of the seizure and of any deterioration of the property in the meantime, in the event of its being returned, and all costs, charges, and expenses which the said John Nokes may incur), and further to observe, keep, and perform all orders made by the judge in the suit; then this obligation shall be void, or else remain in full force and effect.

Signed, sealed, and delivered in } (L.S.)
the presence of } (L.S.)
} (L.S.)

(See pp. 96, 101.)

66. FORM OF ASSIGNMENT TO BE ENDORSED, IF REQUIRED.

Know all men by these presents that I, Henry McPhall, Bailiff of the Division Court, in the County of , have, at the request of the within-named John Nokes (*the defendant*), assigned over this replevin bond unto the said John Nokes, pursuant to the rule in such case made and provided.

In witness whereof I have hereunto set my hand and seal this day of , A.D. 18 .

Signed, sealed, and delivered in the }
presence of } Seal. }

67. BAILIFF'S RETURN TO WRIT OF REPLEVIN.

In the Division Court, in the County of
Between HENRY BRAY, *Plaintiff*,
and

JOHN NOKES, *Defendant*.

In pursuance of the Division Court Rules in that behalf, I have taken from the said plaintiff a bond conditioned as by the said rules required, made by him, and two sureties, namely, Robert Leslie, of the Village of Kemptville, in the County of Grenville and Province of Ontario, Esquire, and Horace Kilborn, of the Village of Newboro', in the County of Leeds and Province of Ontario, Esquire, which bond bears date the day of , 18 , and is witnessed by Samuel McCammon, of the Town of

Gananoque, in the County of Leeds, Esquire. And by virtue of the annexed writ to me directed, I have seized and delivered to the plaintiff the goods mentioned in said writ, that is to say: (*here describe the goods by number, quantity, and quality*); [*or if only a part had been replevied, say, a portion of the goods in the said writ mentioned, that is to say: (*here describe them*)*], and I cannot make replevin of the residue of said goods, namely (*shortly describe them*), as by said writ commanded, by reason of the same having been removed or carried out of this county by the defendant (*or as the case may be*).

Dated the day of , 189 .
HENRY McPHALL,
Bailiff.

(See pp. 98, 99.)

68. INVENTORY OF GOODS REPLEVIED.

In the Division Court, in the Count of
Between HENRY BRAY, *Plaintiff*,
and
JOHN NOKES, *Defendant*.

An inventory of property and effects by me this day replevied in the Township of Elizabethtown, in the County of Leeds, by virtue of a writ of replevin, issued by David B. Jones, Clerk of the Division Court in the Count of , on behalf of the plaintiff against the defendant, that is to say: (*here state all the articles replevied*).

Dated the day of , 18 .
Bailiff.

(See p. 98.)

69. WRIT IN REPRISAL.

(*Capias in Withernam.*)

No. , A.D. 18 .
In the Division Court, in the Count of
Between HENRY BRAY, *Plaintiff*,
and
JOHN NOKES, *Defendant*.

{ Seal. }

To Henry McPhall, Bailiff of the said court:—

Upon application of the plaintiff, and it appearing by your return to the writ of replevin issued herein on the day of , 18 , that the goods, chattels, and personal property (*or a portion of the goods, chattels and personal property as the case may be*) mentioned in the said writ had been removed or carried (*eloigned*) by the defendant out of this county so that you could not make replevin of the same;

You are now hereby commanded that, without delay, you do take in withernam (in reprisal) the goods, chattels, and personal property of the said defendant in this county, to the value of the goods, chattels, and personal property by the said defendant before taken, and do forthwith deliver them to the said plaintiff, to be kept by him until the said defendant delivers the goods, chattels, and personal property last aforesaid to the said plaintiff.

And you are hereby further commanded that if the said plaintiff shall give security to you, as provided by law, for the prosecution of the plaintiff's claims and for the return of the goods, chattels, and property, so to be taken in withernam, as aforesaid, if the return thereof shall be adjudged, then that you, the said bailiff, do take security with two sufficient sureties from the said defendant to answer to the said plaintiff for the taking and unjustly detaining of his goods, chattels and personal property aforesaid.

And you are hereby further commanded forthwith to make return to the clerk of this court what you shall have done in the premises, and do also return this writ.

[illegible]

GARNISHEES.

70. SUMMONS TO GARNISHEE AND PRIMARY DEBTOR AFTER JUDGMENT.

No. , A.D. 18 .

In _____ Division Court, in the County of _____

{ Seal. }

Between ABRAHAM BERNER, *Primary Creditor*,) Judgment recovered on
and the day of , A.D.
CHARLES DOOLITTLE, *Primary Debtor* 18, in the Division Court
and in the County of
EMERY WHEELER, *Garnishee*.) Amount unsatisfied, \$

You, the above-named garnishee and the primary debtor, are hereby summoned to appear at the sittings of this court, to be held at _____, in the said county, next after the expiration of _____ days from the time this summons is served on you, to state and to show whether or not you, the said garnishee, owe any, and what, debt to the above-named primary debtor, and why you should not pay the same into court, to the extent due on the above-named judgment, to satisfy the same;

And you, the said garnishee, are hereby notified that, from and after the time of the service of this summons on you, all debts due or accruing due from you to the above-named C..... D..... are attached, and if you pay the same to any one other than to the person holding the proper order to receive the same, or into court, you will be liable to repay it, in case the court or judge so order.

And you, the said primary debtor, and garnishee, are hereby, severally, required to take notice that if any or either of you desires to set up any statutory or other defence, or any set-off, or to admit any liability of any or either of you, in whole or in part, for the amount claimed in this action, you must file with the clerk of this court the particulars of such defence or set-off, or an admission of the amount due or owing by any or either of you (*as the case may be*), within eight days after service on you, respectively, of this summons. In the absence of any notice of such defence or set-off, the judge may, in his discretion, give judgment against you, or either of you.

You, or any one interested, may also show any other cause why the said debt should not go to satisfy the said judgment.

The sittings of the court are set forth below.

Given, etc. (close as in form 47).

(See p. 334.)

NOTICES AND WARNING TO GARNISHEE AND PRIMARY DEBTOR.

No. 1. The primary debtor, the garnishee, and all other parties in any way interested or to be affected by this proceeding, are entitled to set up any defence, set-off, or counterclaim, as between the primary creditor and the primary debtor, which the latter would be entitled to set up in an ordinary action, and also any defence, set-off or counterclaim as between the garnishee and primary debtor; and may also show any other just cause why the debt sought to be garnished should not be paid over or applied in or towards satisfaction of the claim of the primary creditor.

Nos. 2, 3, 4, and 5. Add warnings numbered 3, 4, 5, and 6, as shown in form 47.

No. 6. Endorse notice as directed by section 98 (now 102) as in form 48.

No. 7. Memorandum in form 71, as required by section 177, (now 182) in cases where debt sought to be garnished is for wages or salary, to be added here, unless included in particulars of claim. (See p. 334 and additional Form No. 256).

71. MEMORANDUM UNDER SECTION 177 (NOW SECTION 182) OF THE DIVISION COURTS ACT IN A GARNISHEE SUMMONS.

(1) The primary debtor resides at the City of Hamilton, in the Province of Ontario, and his occupation in the service of the garnishees is that of an engine driver (*or as the case may be*) on the railway of the garnishees (the Grand Trunk Railway Company of Canada), and is occupied as such on said railway between the cities of Toronto and Hamilton (*or as the case may be*).

(2) The debt alleged (*or, if after judgment, "adjudged"*) to be due by the primary debtor to the primary creditor was incurred for board or lodging. (See p. 334 and additional Form No. 256).

72. SUMMONS TO PRIMARY DEBTOR (BEFORE JUDGMENT) AND GARNISHEE.

(Insert Title of Court and Style of Cause as in Form 46.)

No. , 18 .

{ Seal. }

The primary creditor claims from the primary debtor the amount of the annexed account.

You, the above-named primary debtor, are hereby summoned to appear at the sittings of this court, to be held at the Court House, in the City of St. Thomas, in the said County of Elgin, next after the expiration of days from the time this summons is served on you, at the hour of o'clock in the forenoon, to answer the primary creditor, who sues you for the recovery of the annexed claim; and you, the garnishee, are required to appear at the same time and place to state and show whether or not you owe any and what debt to the primary debtor, and why you should not pay the same into court, to the extent of the primary creditor's claim, in satisfaction thereof; and take notice that if any or either of you desire to set up any statutory or other defence, or any set-off, or to admit the liability of any or either of you in whole or in part for the amount claimed in this action, you shall file with the clerk of this court

73b. CLERK'S MEMORANDUM OF NON-APPEARANCE OF GARNISHEE.

(Under Consolidated Rule of Supreme Court of Judicature, No. 943, now C.R. 918.)

Memorandum.

I, X..... Y....., Clerk of the Division Court in the within order named, attended this day of , 18 , at the place within mentioned, from o'clock in the noon (as the case may be) till past in the noon (as the case may be) of the same day, and the said J..... K..... (garnishee) did not appear before me according to the said orders.
(See pp. 362, 363.) X..... Y.....,
Clerk.

MEMORANDUM OF ADMISSION OF DEBT, WHEN SIGNED BY GARNISHEE.

Memorandum.

On this day of , 18 , the within named (garnishee) appeared before me according to the within order,* and admitted that he was and is indebted to the within-named G.H. (judgment debtor) in the sum of \$ (if the whole debt be not admitted, add, "and no more"). (If the garnishee be willing to sign the admission, add, "and signed the subjoined admission in my presence.")

X..... Y.....,
Clerk.

I, J..... K....., the within named, admit that there is a debt of \$ (if the whole debt be not admitted, add, "and no more") due from me to the within named (judgment debtor).

(See pp. 362, 363.)

J..... K.....,
(Garnishee signature.)

MEMORANDUM, WHERE GARNISHEE DENIES DEBT.

On, etc., (as in previous form to the asterisk*), and disputes the debt claimed to be due from him to the within named (Judgment debtor.)

(If the garnishee be willing to sign the denial of debt, add, "and signed the subjoined denial of debt in my presence.")

X..... Y.....

I dispute the debt claimed to be due from me to within named.
(See p. 363.) J..... K.....,
(Garnishee signature.)

74. FORM OF AFFIDAVIT OF SERVICE OF GARNISHEE SUMMONS AFTER JUDGMENT ON THE AGENT OF A BODY CORPORATE UNDER SECTION 182 (NOW SECTION 187) OF THE ACT.

(Title of Court and Style of Cause.)

I, A..... B....., of , etc., make oath and say as follows:—

1. That I did on the day of , 18 , duly serve G..... H..... with a true copy of the within (or annexed) summons, notices, memorandum, or warnings therein and thereon, in this cause, by delivering the same to the said G..... H..... personally.

2. That at the time of such service the said G..... H..... was the agent of the above-named garnishees at (name of place), and that at the said time he as such agent had an office at (name of place), that such office was at the time of said service within the limits of the Division Court of the County of , and that I necessarily travelled miles to make such service.

Sworn, etc.

(See p. 341.)

75. FORM OF AFFIDAVIT OF SERVICE OF GARNISHEE SUMMONS BEFORE JUDGMENT ON THE AGENT OF A BODY CORPORATE UNDER SECTION 185, (NOW SECTION 190) SUB-SECTION 2.

(Commence as in form 74 to end of paragraph 1).

2. That at the time of such service the said G..... H..... was the agent of the above-named garnishees at (name of place), and that at the said time he, as such agent, had an office at (name of place), and that I necessarily travelled miles to make such service.

Sworn, etc.

(See pp. 344, 345.)

76. BOND UNDER SECTION 196. (NOW SECTION 210.)

(Commencement and conclusion same as in replevin bond, except that the bond must be to the clerk by his name of office, conditioned as follows:)

Whereas, in a certain garnishee proceeding under The Division Courts Act, wherein the said A..... B..... is primary creditor, C..... D..... primary debtor, and E..... F..... garnishee, a certain debt of \$....., due from the garnishee to the primary debtor, has been garnished to answer the debt of the primary creditor; and whereas the judge of the said court, acting under the 196th (210th) section of the said Act, ordered that upon payment of the said debt by the garnishee to the primary creditor security should be given by or on behalf of the primary creditor for the repayment thereof into court by the primary creditor: Now the condition of this obligation is such that if the above-bounden A..... B..... do pay into court the said debt, in case a proper order shall be made for such repayment, within five days after notice of such order, then this obligation to be void, else to remain in full force.

(Close as in replevin bond, form 65.) (See pp. 356, 357.)

MINUTES OF JUDGMENT IN PROCEDURE BOOK.

77. OF JUDGMENT AGAINST DEFENDANT FOR DEBT OR DAMAGES.

Judgment for the plaintiff* for \$..... and \$..... costs; to be paid in days (when an excess has been abandoned, add, being "in full discharge of his cause of action set forth in the claim").

*Add, "On verdict by jury," if such be the fact. (See pp. 190-193.)

78. OF JUDGMENT UNDER SECTION 109 (NOW 113) OF THE ACT.

The defendant, having been served with "Special Summons," and particulars of claim, and not disputing same (or "not disputing \$..... part thereof"), it is adjudged that plaintiff recover \$..... for debt, and \$..... for costs.

R. ROE,
Clerk.

Dated the day of , 18.....
(See pp. 185, 188, 189.)

79. ORDER FOR IMMEDIATE JUDGMENT UNDER SECTION 111 (NOW SEC. 116).

Upon hearing and upon reading the affidavit of filed and

It is ordered that the plaintiff be at liberty to have the clerk of this court enter, and the clerk is hereby empowered to enter, final judgment

in favor of the plaintiff against the defendant* (for the amount of the plaintiff's debt, or money demand) sought to be recovered in this action, as appears by the particulars of claim, endorsed on (or attached to) the special summons herein, with interest (*if any*), and costs to be taxed.

Dated the day of , 18 . (See pp. 195-205.)

Judge.

*If desired, the amount for which judgment is to be signed may be stated here instead of words in brackets.

80. JUDGMENT UNDER SECTION 111 (Now 116).

Commence as in Form 78 to the words "claim" inclusive, then proceed: And disputing same (*or some part thereof, as the case may be*), and the plaintiff having made application to the judge for an order for judgment, as provided by section 111 (now 116) of the Act, and upon due notice to the defendant, the judge, on the day of , A.D. 18 , made an order empowering the clerk to sign final judgment herein for the amount of the debt (*or money demand*) (set forth in the said particulars, together with interest and costs, it is adjudged, etc. (*Conclude as in Form 78.*)

(See p. 195 *et seq.*)

81. OF JUDGMENT WHERE SOME DEFENDANTS HAVE BEEN SERVED WITH SPECIAL SUMMONS, AND OTHERS HAVE CONFESSED.

The defendant, C..... D....., having been served with special summons and particulars of claim, and not disputing \$ part thereof, and the defendants E..... F..... and G..... H..... having confessed the same as due to the plaintiff, it is adjudged that the plaintiff recover \$ for debt, and \$ for costs. (See Rule 118, pp. 189, 370, 383.)

82. OF JUDGMENT OF NON-SUIT OR DISMISSAL FOR WANT OF PROSECUTION.

Judgment of non-suit, "*or that the cause be dismissed*" (*if costs, etc., ordered add, "and the plaintiff pay \$ for defendant's costs," or \$ for defendant's trouble and attendance, and \$ for his costs, to be paid in days*).

83. OF JUDGMENT ON AWARD.

Judgment for the plaintiff (*or defendant*) for the sum of \$ and \$ costs (*or for the sum of \$ costs*), pursuant to award, to be paid in days. (See Rule 126, p. 369.)

84. OF JUDGMENT FOR DEFENDANT.

Judgment for the defendant* (*or for the defendant for \$ costs; or \$ for his trouble and attendance, and also \$ for his costs, to be paid forthwith*).

*Add, "On verdict by jury," *if such be the fact.*

85. OF JUDGMENT FOR DEFENDANT ON SET-OFF, WHERE SET-OFF IN PART SATISFIED.

It appearing that the defendant's set-off exceeds the plaintiff's claim, as proved by over \$100, it is adjudged that the plaintiff's claim, proved at \$, be discharged, and that the defendant's set-off to \$ be satisfied, and, further, that the defendant do recover against the plaintiff \$ for his costs, to be paid in days.

86. OF JUDGMENT FOR DEFENDANT FOR BALANCE OF SET-OFF.

It appearing that the defendant's set-off exceeds the plaintiff's claim, is adjudged that the plaintiff's claim, proved at \$, be discharged, and that the said set-off as to that amount be satisfied, and, further, that as to \$, residue of such set-off, the defendant have judgment for the same, together with \$ for his costs, to be paid in days.

(See Rule 127, pp. 112, 113, 115, 379.)

87. JUDGMENT IN CASE OF COUNTERCLAIM.

It is adjudged that the plaintiff do recover against the defendant the sum of \$ for debt (or damages), and \$ for costs, amounting together to the sum of \$, and that the defendant, on his counterclaim, do recover against the plaintiff the sum of \$ for debt (or damages as the case may be), and \$ for costs, amounting together to the sum of \$, and that the said sum be set off one against the other, and that the do recover from the the sum of \$ (being the difference between said sums), to be paid in days.

(See Rule 127, pp. 112, 113, 115.)

88. FORMS OF JUDGMENTS AGAINST MARRIED WOMAN.

(a) In respect of liabilities incurred, whether for costs or otherwise, during marriage.

It is adjudged that the plaintiff (or defendant) do recover \$ and costs against the defendant (or plaintiff); such sum and costs to be payable out of her separate property, as hereinafter mentioned, and not otherwise. And it is ordered that execution hereon be limited to the separate property of the defendant (or plaintiff), B..... A....., not subject to any restriction against anticipation, unless by reason of The Married Woman's Property Act the property shall be liable to execution notwithstanding such restriction.

(b) Where the judgment is recovered in respect of a debt contracted by her before marriage.

It is adjudged that the plaintiff do recover the sum of \$ and costs against the defendant, A..... B....., such sum and costs to be payable out of her separate property, whether subject to any restriction against anticipation or not, and not otherwise. (See pp. 189, 200.)

89. JUDGMENT FOR COSTS UNDER SECTION 209 (NOW SEC. 215) OF THE ACT.

The defendant having disputed the plaintiff's claim—but afterwards, before the opening of the court to which he was summoned, confessed judgment (or paid the claim) so short a time before the sitting of the court that the plaintiff could not, in the ordinary way, be notified thereof—and the plaintiff having *bona fide* and reasonably incurred \$ expenses in procuring witnesses to attend the court to prove his case (or in attending at court);

It is therefore adjudged and ordered that the defendant do pay the said plaintiff the sum of \$ for such costs. (See p. 375.)

90. ENTRY OF JUDGMENT FOR DEFENDANT'S COSTS UNDER RULE 252*a*.

The plaintiff being desirous of not proceeding in this cause, but failing to give notice thereof and pay defendant's costs, and not proceeding to trial at a court holden this day, the defendant having applied for his costs (*or* the cause not being withdrawn until after the opening of court), it is adjudged that the defendant do recover against the plaintiff the sum of \$ for costs incurred in preparing for trial (*or* in attending court) before notice of such withdrawal, and for costs of his defence.

(See p. 376.)

91. MINUTE OF JUDGMENT FOR CLERK WHEN JUDGMENT POSTPONED.

In the Division Court, in the County of
Between A. B., Plaintiff,
and
C. D., Defendant.

At the sittings of this court, held on the day of , 18 , at , in the said division, the case came on to be heard, and after the hearing thereof by the judge in open court the giving judgment thereupon was postponed by the judge till the day of , 18 , at the hour of , at the office of the clerk of this court; the case having since been maturely considered by the judge, it is adjudged, etc. (*according to judgment*).

The clerk will read this decision to the parties or their agents, if present, and forthwith enter judgment according to the statute in that behalf. (See p. 272, 273.)

Dated, etc.

..... Judge.

92. FORM OF JUDGMENT AGAINST A FIRM, ETC.

Judgment for the plaintiff against the said firm of A. B. & Co., and also against O. P., the partner thereof served with a copy of summons herein, and who has failed to appear (and also against R. S., who has admitted in the notice of dispute or defence filed that he is, or who has been adjudged a partner of the said firm), for \$, and \$ costs, to be paid forthwith (*or as the case may be*). (See pp. 174, 183.)

93. OF ORDER FOR IMPOSITION OF FINE FOR CONTEMPT.

It is adjudged that E. F., at the sittings of this court now holden in open court, is guilty of a contempt of the said court, by wilfully insulting judge (*or* deputy *or* acting judge) of the said court (*or* "in view of the court, by wilfully insulting clerk (*or* bailiff) of the said court, during his attendance at such court") *or* "by wilfully interrupting the proceedings of the said court"; and it is ordered that the said E. F. forthwith pay a fine of \$ for such offence, and, in default of immediate payment, be committed to the common gaol of this county for days, unless such fine, the costs herein, and the expense attending the commitment be sooner paid. (See pp. 477, *et seq.*)

94. OF IMPOSITION OF FINE ON A JUROR FOR NON-ATTENDANCE.

Adjudged that G. H. was duly summoned to attend this court, now holden, as a juror, that he hath wilfully neglected (*or* refused) to attend the court in obedience to the summons, and that he do within days (*or* forthwith) pay a fine of \$. (See p. 313.)

95. ENTRY IN THE PROCEDURE BOOK UNDER THE CREDITORS' RELIEF ACT, WHERE THERE IS A JUDGMENT.

The plaintiff (or defendant), as a creditor of the defendant (or plaintiff), having served upon the sheriff of the County of _____, a memorandum of the amount of this judgment under The Creditors' Relief Act, under which proceedings were taken against the defendant (or plaintiff) for the recovery thereof, and because the same was not paid in full) *where part of the judgment has been paid through those proceedings or otherwise, here state it thus*), but \$ _____, part thereof, having been paid, the said sheriff hath returned as follows (*here state the return*), and because he was unable to make the residue (or the money thereon) satisfaction is entered for the sum of \$ _____, part thereof (*if no part was recovered leave out the words "satisfaction is entered for the sum of \$ _____, part thereof"*), and judgment is entered for the plaintiff (or defendant) for the sum of \$ _____, balance of the debt (or damages) and \$ _____ costs. (See Rule 133; pp. 390, 411.)

96. JUDGMENT UNDER THE CREDITORS' RELIEF ACT.

Where the proceedings were not upon a judgment or execution, but upon a certificate of claim.

Proceed, as in previous form, to the words "a memorandum," and thence as follows:—A certificate for a claim within the jurisdiction of this court, amounting to the sum of \$ _____ debt (or damages) and \$ _____ costs, under The Creditors' Relief Act, under which proceedings were taken for the recovery thereof against the defendant (or plaintiff), which not being paid in full, and the said sheriff, being unable to make the money thereon, returned the same under the provisions of the said Act, judgment is therefore entered for the plaintiff (or defendant) for \$ _____ debt and \$ _____ costs. (*If the sheriff has returned that he has made part, then the fact should be stated, and judgment should be entered for the residue only.*) (See pp. 389, 390.)

97. ORDER FOR JUDGMENT WITHOUT PLAINTIFF'S FILING NOTE SUED ON.

(Title of Court and Style of Cause.)

(Date, etc.)

Upon the application of the plaintiff, and upon reading the affidavit of _____, filed, it is ordered that the plaintiff be at liberty to have judgment entered in his favor in this action without his filing the note sued on herein, on his filing a true copy thereof with the clerk of the court.* (See p. 157.)

*Provide for ease of bond where note lost.

.....
Judge.

98. JUDGMENT AGAINST DEFENDANT ON CONFESSION BEFORE ACTION.

C..... D....., being indebted to A..... B..... in the sum of \$ _____ for a debt, and having acknowledged the same in writing (with particulars attached thereto) before G..... L....., clerk (or bailiff) of this court, and the same being duly proved and produced to the judge, and the said A..... B..... requesting judgment thereon, it is adjudged that the said A..... B..... do recover against the said C..... D..... the said sum of \$ _____ for debt, and \$ _____ for costs. (See Rule 122; pp. 188, 189, 370, *et seq.*)

99. JUDGMENT ON CONFESSION AFTER ACTION.

The defendant having been served with summons and particulars of claim for a debt, amounting to \$ (and the plaintiff having consented to take the defendant's acknowledgment for the sum of \$, part thereof, and abandoned the residue; or having allowed the defendant's set-off thereout; or made certain deductions claimed therefrom), and the defendant having confessed the same (or \$) in writing before G..... L....., clerk (or bailiff), and the confession being duly proved and produced.

(Conclude as in the preceding form.) (See Rule 101; p. 188.)

100. JUDGMENT WHERE EXECUTION POSTPONED BY CONSENT OF JUDGMENT CREDITOR BEYOND FIFTY DAYS.

Judgment* for the plaintiff for \$ debt and \$ for cost, to be paid as follows:—*Here state the time when or the instalments by which the judgment is to be satisfied*), the plaintiff (or the party entitled to the same) having consented to this postponement.

(When an excess has been abandoned, or the defendant has paid money into court which has not been accepted, *add*, "Being in full discharge of his cause of action set forth in the claim.")

**Add*, "On verdict of jury," if the cause was tried by the jury.

(See p. 291.)

101. ORDER TO SUSPEND ORDER, OR JUDGMENT, OR EXECUTION.

(Insert title of Court and Style of Cause.)

It is ordered that the judgment (or order) [or that the execution under the judgment (or order)] of this court in action, bearing date the day of , A.D. 18 , be suspended until the day of , A.D. 18 .

Dated this day of , A.D. 18 . (See p. 291.)

(See p. 291.)

.....
Judge.

102. ORDER POSTPONING EXECUTION OR JUDGMENT UNDER SECTION 147. (Now SEC. 153.)

(Title of Court and Style of Cause.)

Whereas the plaintiff obtained a judgment against the defendant in this court on the day of , 18 , for the payment of \$ debt (or damages) and \$ for costs , and the defendant was ordered to pay the same at a day now past (*if by instalments, specify them*), and it has been made to appear to the satisfaction of the judge by affidavit (or affirmation, or otherwise) that the defendant is unable from sickness (or other sufficient cause) to pay and discharge the debt (or damages) recovered against him (or any instalment thereof, if the same was ordered to be paid by instalments), so ordered to be paid, I do therefore order that the said judgment (or execution, or order, as the case may be) be stayed (or suspended) for (*here specify the time and terms upon which the order is granted.*)

Dated this day of 18 . (See p. 291.)

.....
Judge.

103. ENTRY IN THE PROCEDURE BOOK OF JUDGE'S ORDER FOR EXECUTOR OR ADMINISTRATOR TO REVIVE A JUDGMENT.

On the day of 18 , it was ordered by the judge that the plaintiff, as executor (*or* administrator), have execution against the defendant of a judgment of this court (*or* of the Division Court, etc.), whereby the said C..... D....., in his lifetime, on , recovered against the said defendant the sum of \$, etc. (See p. 391.)

104. ENTRY OF ORDER IN PROCEDURE BOOK THAT JUDGMENT BE REVIVED AGAINST AN EXECUTOR OR ADMINISTRATOR.

On the day of , 18 , it was ordered by the judge that the plaintiff have execution against the defendant, as executor (*or* administrator of E..... F....., deceased, of a judgment of this court (*or* of the Division Court, etc.), whereby the plaintiff, on , recovered against the said E..... F....., in his lifetime, the sum of \$, to be levied of the goods and chattels of the said deceased, in the hands of the said defendant to be administered. (See p. 391.)

105. OF JUDGMENT AGAINST EXECUTOR OR ADMINISTRATOR ON DEVASTAVIT AFTER JUDGMENT.

Judgment that the defendant has wasted goods and chattels of A..... B....., deceased, to the sum of \$, whereby a judgment recovered against him by the plaintiff in the Division Court, in the county of , on the day of , 18 , remains unsatisfied; and that the plaintiff now recover against the defendant the first-named sum, and also \$ costs, to be paid in days. (See pp. 279, 280.)

106. OF JUDGMENT AGAINST EXECUTOR OR ADMINISTRATOR, WHO ADMITS HIS REPRESENTATIVE CHARACTER, AND THE PLAINTIFF'S DEMAND, BUT ALLEGES A TOTAL OR PARTIAL ADMINISTRATION OF ASSETS, AND DOES NOT PROVE THE ADMINISTRATION.

Judgment for plaintiff for \$ debt, and \$ costs, to be paid in days; full (*or* partial) administration, which was alleged, and disputed, not having been proved. Ordered that the said sums be levied of the goods and chattels of the deceased; failing such goods, then the debt of the goods and chattels, hereafter to come to the defendant's hands to be administered, and the costs to be levied of the defendant's proper goods. (See p. 282.)

107. OF JUDGMENT AGAINST EXECUTOR OR ADMINISTRATOR, WHO ADMITS HIS REPRESENTATIVE CHARACTER, AND THE PLAINTIFF'S DEMAND, BUT ALLEGES A TOTAL OR PARTIAL ADMINISTRATION OF ASSETS, AND PROVES THE ADMINISTRATION.

Judgment for the plaintiff for \$, to be paid in days; to be levied of the goods and chattels of the deceased, hereafter to come to the defendant's hands to be administered; the debt not being denied, and full (*or* partial) administration, which was denied, having been proved. Ordered that the plaintiff pay \$ for the defendant's costs in days. (See p. 282.)

108. OF JUDGMENT AGAINST EXECUTOR OR ADMINISTRATOR, WHERE THE DEFENDANT ADMITS HIS REPRESENTATIVE CHARACTER, BUT DENIES THE DEMAND, AND ALLEGES TOTAL OR PARTIAL ADMINISTRATION OF ASSETS, AND THE PLAINTIFF PROVES HIS DEMAND, AND THE DEFENDANT DOES NOT PROVE ADMINISTRATION.

Judgment for plaintiff for \$ for debt, and also \$ costs, to be paid in days, to be levied of the goods and chattels of the deceased; failing such goods, then the said costs to be levied of the defendant's proper goods, and the debt to be levied of the goods and chattels of the deceased, hereafter to come to the defendant's hands to be administered, the plaintiff's demand having been proved, which was denied, and administration, which was alleged, not having been proved. (See pp. 181, 281.)

109. OF JUDGMENT AGAINST AN EXECUTOR OR ADMINISTRATOR, WHERE HE ADMITS HIS REPRESENTATIVE CHARACTER, BUT DENIES THE DEMAND, AND ALLEGES TOTAL OR PARTIAL ADMINISTRATION OF ASSETS, AND THE PLAINTIFF PROVES HIS DEMAND, AND THE DEFENDANT PROVES ADMINISTRATION.

Judgment for the plaintiff for \$ for debt, and also \$ costs, to be paid in days; the plaintiff's demand, which was denied, having been proved, and full (or partial) administration also having been proved, which was denied, the said costs to be levied of the goods and chattels of the deceased; failing such goods, then of the defendant's proper goods; the said debt to be levied of the goods and chattels of the deceased, hereafter to come to the defendant's hands to be administered; and ordered that \$, the costs of proving such administration be paid to the plaintiff in days. (See pp. 281, 282.)

110. OF ORDINARY JUDGMENT AGAINST EXECUTOR OR ADMINISTRATOR.

Judgment for plaintiff for \$, and \$ costs, to be paid in days, to be levied of the goods and chattels of the deceased; failing such goods, the costs to be levied of the defendant's proper goods and chattels. (See p. 280.)

111. OF JUDGMENT AGAINST AN EXECUTOR OR ADMINISTRATOR, WHO ADMITS HIS REPRESENTATIVE CHARACTER, AND DENIES THE DEMAND.

The same as in ordinary judgment against Executor or Administrator, Form 110.

112. OF JUDGMENT AGAINST AN EXECUTOR OR ADMINISTRATOR, WHO HAS DENIED HIS REPRESENTATIVE CHARACTER, OR PLEADED A RELEASE TO HIMSELF.

The same as in ordinary judgment against executor or administrator, Form 110.

113. OF JUDGMENT AGAINST AN EXECUTOR OR ADMINISTRATOR, WHO HAS WASTED ASSETS.

Judgment for plaintiff for \$, and \$ costs, to be paid in days, to be levied on the goods and chattels of the deceased; failing such goods, then the whole (or the sum of \$ and the said cost) to be levied of the defendant's proper goods and chattels; the defendant having wasted the goods of the deceased to that amount. (See pp. 279, 280, 282, 392.)

114. MINUTE IN PROCEDURE BOOK OF JUDGMENT AGAINST GARNISHEE, ON JUDGMENT ALREADY ENTERED.

Judgment entered on the day of in the Division Court, in the County of , year No. , 18 .
Amount unsatisfied, \$

On hearing all parties [or on "hearing the above-named"] (the parties appearing), and upon proof of the debt, it is adjudged that the garnishee is indebted to the primary debtor in \$ now due (or coming due as follows:), which (or \$ of which) ought to be applied in satisfaction of the said judgment, and that the said primary creditor do recover the same against the garnishee, for levying whereof execution may issue days from this date , unless the garnishee shall sooner pay the same into court, to satisfy the said judgment.

Entered the day of , A.D. 18 . (See pp. 343, 344.)

115. MINUTE WHERE THE DEBT DUE BY THE GARNISHEE IS PAYABLE BY INSTALMENTS.

Same as above, from the words "primary debtor" \$ inclusive, and from thence proceed: not now due, but payable by instalments as follows (here state the instalments and when payable), \$ of which ought to be applied in satisfaction of the said judgment, and that the primary creditor do recover against the garnishee, by instalments of \$, every (here specify when payments ordered to be made). The first of such instalments to be paid on the day of , 18 , unless, etc. (Close as in the preceding form.) (See p. 343.)

116. MINUTE IN PROCEDURE BOOK OF JUDGMENT AGAINST PRIMARY DEBTOR AND AGAINST GARNISHEE.

On hearing all parties [or "on hearing the primary creditor (or as the case is), the primary debtor (or as the case is) having made default"], it is adjudged, 1st, That the primary debtor is indebted to the primary creditor in \$, and that he do pay the same and \$ costs in days. 2nd, That the garnishee is indebted to the primary debtor in \$, which (if the garnishee's debt be larger than the primary creditor's claim, say: "to the extent of the two first-mentioned sums") ought to be applied in satisfaction thereof. 3rd, That the primary creditor do recover against the garnishee the said sum of \$, to be paid in days (as time may be given for payment of debt becomes due), in satisfaction as aforesaid. (See pp. 343, 346.)

117. WHERE THE DEBT DUE BY THE GARNISHEE IS PAYABLE BY
INSTALMENTS.

Same as in Form 116 up to the asterisk,* from thence proceed: not now due, but payable by instalments as follows (*here state the instalments and when payable*), as in Form 116 to the end. (See p. 343.)

118. WHERE THE GARNISHEE HAS SET UP DEFENCE WHICH HE KNEW
TO BE UNTENABLE.

And inasmuch as the garnishee has set up a defence which he knew, or ought to have known, was untenable, it is adjudged that he do pay the costs of this proceeding, amounting to \$, forthwith (or within days. (See p. 354.)

119. MINUTE OF JUDGMENT IN FAVOR OF GARNISHEE, PRIMARY DEBTOR,
OR CLAIMANT.

On hearing all parties (or on hearing the garnishee, the primary creditor having made default), it is adjudged that the garnishee is not indebted to the primary debtor, as claimed by the primary creditor, and that the primary creditor pay the garnishee \$ for his costs, to be paid in days. (See p. 347.)

120. JUDGMENT WHERE PRIMARY CREDITOR FAILS IN RECOVERY OR
PROVING FOR CLAIM AND PROCEEDINGS HAVE BEEN CONTINUED
AS BETWEEN THE PRIMARY DEBTOR AND THE GARNISHEE.

The primary creditor having failed to prove his claim against the primary debtor, or become non-suited, and upon hearing the matter in controversy between the primary debtor and the garnishee, it is adjudged that (*here follow any other form of judgment suitable to the case of an ordinary proceeding between plaintiff and defendant*), and it is ordered that the primary creditor do pay the primary debtor (or garnishee). *Here state whatever the judgment may be as to costs or otherwise.* (See p. 349.)

121. Judgment for the primary debtor (or for the garnishee, or for the third-party claimant) against the primary creditor for \$ costs (or for \$ for his trouble and attendance, and for his costs), to be paid forthwith (or within fourteen days). (See p. 349.)

122. It appearing that the set-off of the primary debtor exceeds the claim of the primary creditor, as proved, by over \$100, it is adjudged that the claim of the primary creditor proved at be discharged, and that the set-off of the primary debtor to \$ be satisfied; and, further, that the primary debtor do recover against the primary creditor \$ for his costs, to be paid in days, and that the attachment of the debt garnished be discharged. (See p. 351.)

123. SUMMONS UNDER SECTION 197 (NOW SECTION 202), WHERE A THIRD PARTY CLAIMS THE MONEY GARNISHED.

(Title of Court and Style of Cause.)

Upon reading the garnishee summons issued in this cause, and upon hearing the primary creditor [the primary debtor] and the garnishee;

It is ordered that the further hearing of the parties to the said summons herein do stand adjourned until the day of , A.D. 189 , at (or "the next sittings of this court"), and that G..... H....., who claims to be entitled to the said debt, the primary creditor, the primary debtor, and the garnishee, their solicitors or agents, attend before the presiding judge at the next sittings of this court at , on the day of , A.D. 189 , at o'clock in the noon of the same day (or *such other time as may be appointed*), and state the nature and particulars of their respective claims to such debt, and maintain or relinquish the same, and abide by such order as may by the said presiding judge be made herein, and that the costs of the adjournment and of this order be costs in the cause.

Dated, etc.

(Rule 77, p. 361.)

.....
Judge.

JUDGMENTS IN REPLEVIN.

124. IN FAVOR OF PLAINTIFF.

Judgment for the plaintiff (*if case tried with a jury*, add: on verdict by jury) for \$, and \$ costs, to be paid in days.

(See p. 99.)

125. IN FAVOR OF DEFENDANT IN REPLEVIN FOR RENT.

Adjudged that the plaintiff do return to the defendant the goods and chattels (*or cattle*) (*stating the particulars*), and pay \$ for costs in days [or adjudged that the amount due for rent in arrear from the plaintiff to the defendant is \$, and that the goods and chattels (*or cattle*) were of the value of \$, and that the plaintiff do in days pay the said sum of \$ and also the sum of \$ for costs of suit].

(See p. 100.)

126. IN FAVOR OF DEFENDANT IN REPLEVIN OF CATTLE, DAMAGE FEASANT.

Adjudged that the plaintiff do return to the defendant the cattle (*here specify the cattle*) or do pay in days the sum of \$, which is adjudged as the amount of damage sustained by the defendant, and that the plaintiff do pay within days \$ for costs.

(See p. 100.)

127. IN FAVOR OF DEFENDANT WHERE REPLEVIN IS NOT FOR RENT OR FOR DAMAGE FEASANT.

Adjudged that the plaintiff do return to the defendant the goods and chattels (or the cattle) (*stating the particulars thereof*) forthwith (or in days), and that the plaintiff do pay the defendant in days \$ for costs of suit (if damages be awarded, add: and \$ for damages sustained by the defendant).

(See p. 100.)

DETINUE.

128. JUDGMENT FOR DELIVERY OF GOODS.

It is adjudged that the plaintiff do recover against the defendant the following goods and chattels of the plaintiff wrongfully detained by the defendant, that is to say:—

(*Here enumerate the chattels which the court decides have been detained*) or \$ their value, and also the sum of \$ for damages, for their said detention, and the sum of \$ for costs.

And it is ordered that the defendant do return the said goods to the plaintiff, or do pay the sum of \$, their value, to the clerk of this court on the day of , A.D. 18 .

And it is further ordered that the defendant do pay the said damages and costs, amounting together to the sum of \$, to the clerk of the court, on the day of , A.D. 18 (or forthwith).

If the judge makes an order at the trial for a return of the goods and chattels without giving the defendant the option of returning them, omit the words in brackets and substitute the following:—

And it is ordered that the defendant do return the said goods and chattels to the plaintiff on the day of , A.D. 18 , and that in default of his so doing a warrant of delivery do issue.

(See pp. 99, 221, 222).

129. FORM OF JUDGMENT WHERE IMMEDIATE RETURN IS ORDERED, WITH DAMAGES AND COSTS.

It is adjudged that the defendant does unjustly detain the goods and chattels of the plaintiff, viz.: (*here enumerate and shortly describe the goods*), and it is ordered that the defendant do return the same to the plaintiff forthwith and that a warrant of delivery do issue therefor, and that the defendant do pay \$ damages for the unjust detention thereof, and \$ the costs of this suit, amounting together to the value of \$, to the clerk forthwith, and in default of his so doing that execution do issue therefor immediately.

(See p. 222.)

130. ORDER ON PARTY TO PAY COSTS TO CLERK, UNDER SECTION 55 (59).

(Insert title of Court and Style of Cause, or Causes, if more than one.)

Upon reading the summons herein granted on the _____ day of _____, A.D. 18____, the affidavit filed, the affidavit of service thereof, and upon hearing the clerk of the said _____ Division Court, and the said plaintiff (or as the case may be), I do order that the said _____ do pay to the clerk of this court the sum of \$ _____ within _____ days from this date, as the fees which should have been paid by him to the clerk of the court on the proceedings herein, and which now remain unpaid, together with the costs of this proceeding, and in the event of the said sum not being so paid it is further ordered that execution do issue against the goods and chattels of the said _____, or that the same be made and levied by such ways and means as any debt or damages ordered to be paid by the court may or can be recovered by process of the said court, and that an entry of this order be made in the procedure book.

Dated at _____ this _____ day of _____, 189____.

(See p. 49.)

Clerk.

131. APPEAL TO THE HIGH COURT.

Form of Entry of Judgment under Section 152. (158).

This case having been appealed to a judge of the Court of Appeal, who having ordered (or given direction) touching the decision (or judgment) to be given herein, judgment is therefore entered (here state the short matter and provision of the order, as the case may be), with costs to be paid, as ordered. (See p. 305.)

EXECUTIONS.

132. AGAINST GOODS OF DEFENDANT.

No. _____, A.D. 18____.

(Insert title of Court and Style of Cause.)

{ Seal. }

Whereas on the _____ day of _____, A.D. 18____, the plaintiff duly recovered in said court judgment against the defendant for \$ _____ for debt (or damages) and \$ _____ for costs of suit, which remains unsatisfied (when the judgment has been revived, add, "and on the _____ day of _____, A.D. 18____, the said judgment was duly revived"), you are hereby required to levy of the goods and chattels of the defendant, in the said County (not exempt from execution), the said moneys, amounting together to the sum of \$ _____, and your lawful fees; so that you may have the same within thirty days from the date hereof, and pay the same over to the clerk of this court for the plaintiff.

Given under the seal of the court this _____ day of _____, A.D. 18____.
To V. _____ W. _____, X. _____ Y. _____
Bailiff of said Court. Clerk.

Judgment..... \$ _____

Interest.....

Subsequent costs.....

This execution.....

Levy the sum of _____ \$ _____, and your lawful fees
upon this precept.

(See pp. 379, et seq.)

132a. In case several judgments have been recovered against an absconding debtor, and one execution is issued thereupon, in pursuance of rule 30, such execution should recite the several recoveries, with their respective amounts.

(See p. 449.)

133. WARRANT OF EXECUTION WHERE ONE OF SEVERAL PLAINTIFFS HAS DIED AFTER JUDGMENT AND BEFORE EXECUTION.

Same in all respects as other warrant, except that the following may be inserted after the statement of the recovery of judgment:—

And whereas G..... R....., one of the plaintiffs, has died since judgment was given (or signed) and before execution executed.

(See p. 391.)

134. AGAINST GOODS OF PLAINTIFF.

No. , A.D. 18 .

(Insert title of Court and Style of Cause.)

{ Seal. }

Whereas on the day of , A.D. 18 , in said court, judgment was given for the defendant, and for \$ costs (or judgment was given that plaintiff be non-suited; or that the action be dismissed, and that the plaintiff do pay the sum of \$ to the defendant for his trouble and attendance, and \$ for his costs, which remain unsatisfied) —(here follow the last form of execution to end, transposing the words "plaintiff" and "defendant" where they occur). (See p. 372.)

135. ON JUDGMENT FOR BALANCE OF SET-OFF.

No. , A.D. 189 .

(Insert title of Court and Style of Cause.)

{ Seal. }

Whereas, at the sittings of this court, holden on the day of , A.D. 18 , it was adjudged that the above named defendant should recover against the above-named plaintiff the sum of \$, the residue of his set-off exceeding the plaintiff's claim, together with \$, his cost of suit, which remains unsatisfied, you are hereby required (conclude as directed in last form). (See pp. 112, 113, 244.)

136. FOR COUNTERCLAIM.

The same as the foregoing form, to the words "the residue" inclusive, and proceed: of his counterclaim (exceeding the plaintiff's claim) (as the case may be), together with \$, his costs of defence, and of proving his said counterclaim (as the case may be), which remains unsatisfied, etc. (Conclude as directed in previous forms).

(See pp. 112, 113.)

137. EXECUTION UNDER SECTION 82 (NOW 85), WHERE JUDGMENT OBTAINED AGAINST A DEFENDANT RESIDING IN A FOREIGN COUNTY.

No. . A.D. 18 .

(Insert title of Court and Style of Cause.)

{ Seal. }

Whereas the place of sitting of this court is nearest to the defendant's residence, and at the sitting of the said court, holden on the day of , A.D. 18 , in and for the said division, by judgment of the said court the plaintiff recovered against the defendant, under the provisions of section 82 of the Division Courts Acts, the sum of \$ for debt, and \$ for costs remaining unsatisfied, you are hereby required to levy of the goods and chattels of the defendant (not exempt from execution), in the said County of (or in the County of , where the defendant resides), the said moneys, etc. *(Conclude as in form 132. (See pp. 136, 137).)*

138. ON TRANSCRIPT OF JUDGMENT FROM ONE DIVISION COURT TO ANOTHER.

No. . A.D. 18 .

(Insert title of Court and Style of Cause.)

{ Seal. }

Whereas on the day of , A.D. 18 , the plaintiff duly recovered in the Division Court, in the County of , judgment against the defendant for \$ for debt, and \$ for costs of suit *(if the judgment was revived use the following words:)* "and on the day of , A.D. 18 , the said judgment was duly revived", as appears by a transcript of the entry of such judgment attested by the seal of the court, certified and signed by , the clerk thereof, and sent and addressed to the clerk of this Division Court, pursuant to the provisions of The Division Courts Act. And whereas it appears, by certificate of the first-mentioned clerk at the foot of the transcript, that the amount unpaid on the said judgment is \$, which said transcript and certificate is duly entered in the book of this court, therefore you are hereby required, etc. *(Conclude as in form 132).*

(See p. 388.)

139. FOR AN EXECUTOR ON JUDGMENT REVIVED IN HIS FAVOR.

No. . A.D. 18 .

(Title of Court.)

{ Seal. }

Between A..... B....., Executor of C..... D..... (or administrator), deceased, Plaintiff,
and
E..... F....., Defendant.

You are hereby required to levy of the goods and chattels of the defendant (not exempt from execution), in the said County of , the

sum of \$, which C..... D....., in his lifetime, in this court (or in the Division Court, etc.), on , recovered against the defendant for his debt (or damages) and costs (leave having on the day of A.D. 18 , been given to the plaintiff or executor (or administrator) of the said C..... D..... to issue execution for the recovery thereof with costs), together with your lawful fees.

And you are further required to have that money within thirty days after the date hereof, and to pay the same over to the clerk of this court for the plaintiff.

(Conclude as in other forms of executions.)

(See pp. 391, 392.)

140. OF JUDGMENT REVIVED AGAINST EXECUTOR OR ADMINISTRATOR.

No. , A.D. 18 .

In the Division Court, in the County of
Between A..... B....., *Plaintiff*,
{ Seal. } and
C..... D....., Executor of E..... F.....,
deceased, *Defendant*.

You are hereby commanded (or as before, or as often before) to make and levy by distress and sale of the goods and chattels of E..... F....., deceased, in the County of (not exempt from execution), in the hands of the said defendant, as executor (or administrator), to be administered, the sum of \$, which the plaintiff in this court (or in the Division Court, etc.), on , recovered against the said deceased in his lifetime for the plaintiff's debt (or damages) and costs, and whereof it was on ordered by the judge of this court (or of the Division Court, etc.) that the said plaintiff should have execution against the said defendant as executor (or administrator) of the said deceased, to be levied of the goods and chattels of the said deceased in the said defendant's hands to be administered, together with the costs of execution herein, and your lawful fees; so that you have the same within thirty days after the date hereof, and pay the same over to the clerk of this court for the plaintiff.

(Conclude as in previous forms of executions.)

N.B.—Executions upon the judgments in other causes against executors may be drawn from this form, with the requisite alterations.

(See pp. 181, 391, 392.)

141. AGAINST GOODS OF TESTATOR.

No. , A.D. 18 .

In the Division Court, in the County of
Between A..... B....., *Plaintiff*,
{ Seal. } and
C..... D....., executor (or Administrator) of
E..... F....., deceased, *Defendant*.

Whereas on the day of , A.D. 18 , the plaintiff duly recovered in the said court judgment against the said defendant as executor (or administrator) of E..... F....., deceased, the sum of \$, for a certain debt, with \$ for costs, to be levied of the goods and chattels of the deceased; failing such goods, the costs to be levied of the

defendant's proper goods and chattels, which said debt and costs were ordered to be paid at a day now past, and remain unsatisfied: These are therefore to command you forthwith to make the levy, by distress and sale of the goods and chattels, which were the property of the said E. F. in his lifetime, in the hands of the defendant to be administered in the County of (not exempt from execution), the said debt and costs, amounting together to the sum of \$, together with the costs of this execution, if the defendant have so much thereof in his hands to be administered; and if he hath not so much thereof in his hands to be administered, then that you levy of the proper goods and chattels of the defendant, in the said County of (not exempt from execution), the said costs and your lawful fees, so that you may have the same within thirty days after the date hereof, and pay the same over to the clerk of this court for the plaintiff.

(Conclude as in previous forms of executions.)

(See pp. 280, 281.)

142. FORM OF EXECUTION IN REPLEVIN AGAINST PLAINTIFF WHEN
RETURN OF GOODS ADJUDGED WITH DAMAGES AND COSTS.

No. , A.D. 18 .

In the Division Court, in the County of

Between HENRY BRAY, Plaintiff,

and

JOHN NOKES, Defendant.

{
Seal.
}

Upon hearing this action of replevin at a sitting of the court, holden at , in and for the said division, on the day of , 18 , it was adjudged that the plaintiff do return to the defendant the goods and chattels (or the cattle) (stating the particulars thereof) forthwith (or in days), and that the plaintiff do pay to the defendant in days \$ for costs of suit (if damages have been awarded, add, "and also \$ for damages sustained by the said defendant"), and the plaintiff has not returned to the said defendant the said goods and chattels (or the said cattle), or paid the said costs (if damages have been awarded and have not been paid, add, and damages), these are therefore to require and order that without delay you cause the said goods and chattels (or the said cattle) to be returned to the defendant, and that you levy of the goods and chattels of the plaintiff, in the said County of (not exempt from execution), the said moneys, amounting together to the sum of \$, and your lawful fees, so that you may have the same within thirty days after the date hereof, and pay the same over to the clerk of this court for the plaintiff.

And you are also required and ordered forthwith to make return to the clerk of this court of what you shall have done in and about returning the said goods and chattels (or the said cattle) to the defendant.

Given under the seal of the court this day of , 18 .

To Henry McPhail,
Bailiff of said Court.

DAVID B. JONES,
Clerk.

Judgment.....\$

Interest.....

Subsequent costs.....

This execution.....

Levy the sum of.....\$, besides your lawful fees on
this precept.

(See p. 100.)

143. EXECUTION ON ORDER FOR NON-PAYMENT OF FEES TO THE
CLERK, UNDER SECTION 55 (NOW 59).

(Insert title of Court and Style of Cause as in summons as in form 56.)

Whereas the fees upon the proceedings in this cause were not paid in the first instance by the plaintiff (or by X..... G....., the party on whose behalf the said proceedings were had) before such proceedings were taken and instituted, as required by section 54 of The Division Courts Act; and the payment thereof has been ordered by the judge, of which the said plaintiff (or A..... G.....) has had due notice; the same having been duly demanded, and there being now due thereon the sum of \$....., which the said plaintiff (or X..... G.....) has neglected to pay;

You are therefore ordered and required to levy of the goods and chattels of the said plaintiff (or X..... G.....) (not exempt from execution) the sum of \$....., and your own fees, etc. (Conclude as in other executions against plaintiff for costs.)

To Thomas Sturge,

Bailiff.

(Mem. as in other executions.)

(See p. 49.)

..... Judge.

..... Clerk.

GARNISHEE PROCEEDINGS.

144. EXECUTION AGAINST GARNISHEE ON JUDGMENT ALREADY
RECORDED.

In the Division Court, in the County of

Seal.	Between A..... B....., <i>Primary Creditor</i> ,	}	Judgment recovered on the
	and		day of, A.D. 18, in
	C..... D....., <i>Primary Debtor</i> ,		the Division Court in the
	and		County of
	E..... F....., <i>Garnishee</i> .		Amount unsatisfied \$

Whereas on the day of, A.D. 189, it was ordered that the garnishee should pay the primary creditor the sum of \$..... (or, if by instalments, state the fact), being the (or so much of the) amount of the debts found to be due from him to the primary debtor (or as is sufficient to satisfy the judgment of the primary creditor), and default having been made therein (or \$....., part thereof, being in default), according to the said order;

You are hereby required to levy of the goods and chattels of the garnishee, in the County of (not exempt from execution), \$..... so owing from him to the primary debtor, and ordered to be paid, and your lawful fees.

And what you shall have done, etc. (Proceed the same as in ordinary executions.)

(See pp. 343, 344.)

147. EXECUTION AGAINST GARNISHEE ON JUDGMENT RECOVERED AGAINST HIM AND PRIMARY DEBTOR.

In the Division Court, in the County of

Between A..... B....., *Primary Creditor*,
and
C..... D....., *Primary Debtor*,
and
E..... F....., *Garnishee*.

{ Seal. }

Amount adjudged due from the primary debtor to the primary creditor
the day of , A.D. 18 , for debt.....\$

For costs.....\$

Total sum\$

Amount adjudged to the primary creditor, for money owing from
the garnishee, the day of , A.D. 18\$

To V..... W....., Bailiff of the said court:—

You are hereby required to levy of the goods and chattels of the garnishee, in the said County of (not exempt from execution), \$ money owing from him to the primary debtor, and which has been adjudged to the primary creditor, to satisfy his said claim against the primary debtor, and your lawful fees, and what you shall have done herein return with this writ within thirty days after the date hereof. (*Conclude as in other executions.*)

(See pp. 346, 347.)

ATTACHMENT OF DEBTS.

148. EXECUTION AGAINST GARNISHEE FOR DEBT, AND ALSO FOR COSTS, UNDER SECTION 191 (NOW 197.)

(Title of Court and Style of Cause.)

{ Seal. }

Amount adjudged due from the primary debtor to the primary
creditor the day of , A.D. 18 , for debt.\$

For costs.....\$

Total sum\$

Amount adjudged to primary creditor for money owing from
the garnishee the day of , A.D. 18\$

To V..... W....., Bailiff of the said court:—

You are hereby required to levy of the goods and chattels of the garnishee (not exempt from execution), in the said County of \$ money owing from him to the primary debtor; and inasmuch as the said garnishee set up a defence to the said claim which he knew (or ought to have known) was untenable, the judge ordered that he should pay the costs of the said proceeding, amounting to \$. You are therefore further required to levy of the said goods and chattels of the said garnishee (not exempt as aforesaid) the said sum of \$, to satisfy the said costs and your lawful fees, and what you shall have done herein return with this writ within thirty days after the date hereof.

Given under the seal of the court the day of , 18 .

(See p. 354.)

N..... Y....., Clerk.

149. EXECUTION WHERE CLAIM MADE BY SOME ONE OTHER THAN THE
PRIMARY CREDITOR OR PRIMARY DEBTOR, TO DEBT SOUGHT TO
BE ATTACHED, AND JUDGE GIVES EFFECT TO CLAIM UNDER
SECTION 197 (NOW 202) OF ACT, WITH COSTS TO
BE PAID TO CLAIMANT.

(Insert title of Court and Style of Cause as in form 144.)

Whereas, upon this cause coming on to be tried, and upon its being proved that a debt was owing from the garnishee to the primary debtor, it appeared that G..... H....., of , claimed to be entitled to the said debt by assignment thereof or otherwise.

And whereas the judge at the sittings of this court, holden at , in the said County of , upon the day of A.D. 18 , having duly called the said G..... H....., and all other proper parties, before him by summons, for the purpose, as provided by the 197th section of The Division Courts Act, enquired into and decided upon the said claim,* and allowed and gave effect to it, and judgment was given that the primary creditor (or as the case may be) do pay to the said G..... H....., the sum of \$ for his cost of so establishing his right to the said debt, which remains unpaid.

You are hereby required to levy of the goods and chattels of the said primary creditor (or as the case may be), in the said County of (not exempt from execution), the sum of \$ for the said costs of the said G..... H..... in so establishing his right to the said debt, together with your lawful fees.

(Proceed as in form 132 and conclude.)

(See pp. 357, 361.)

150. EXECUTION WHERE CLAIM MADE BY SOME ONE OTHER THAN THE
PRIMARY CREDITOR OR PRIMARY DEBTOR, TO DEBT SOUGHT TO
BE ATTACHED, AND JUDGE HOLDS THE CLAIM VOID AS
AGAINST THE PRIMARY CREDITOR UNDER SECTION
197 (NOW 202) OF ACT, WITH COSTS TO
BE PAID BY CLAIMANT.

As in last form to asterisk, and then proceed:* and held the same void as against the primary creditor for being a fraud upon creditors (or otherwise, stating the ground), and judgment was given that the said G..... H..... do pay to the primary creditor the sum of \$ for his costs of opposing the said claim, which remains unsatisfied.

You are hereby required to levy of the goods and chattels of the said G..... H....., in the said County of (not exempt from execution), the said sum of \$ for the said costs of the said primary creditor in so opposing the said claim, together with your lawful fees.

(Proceed as in form 132, and conclude.)

(See p. 361.)

151. FOR GARNISHEE'S COSTS.

No. , A.D. 18 .

In the Division Court, in the County of

Between A..... B....., *Primary Creditor*,

and

C..... D....., *Primary Debtor*,

and

E..... F....., *Garnishee*.

{ Seal. }

To V..... W....., Bailiff of the said court:—

Whereas, at the sittings of this court, holden on the day of
18 , at , it was adjudged that the garnishee was not indebted
to the primary debtor, as claimed by the primary creditor, and judgment
was given for the garnishee against the primary creditor for \$ for
his costs, to be paid at a day now past, and the primary creditor has not
paid the same;

You are hereby required to levy of the goods and chattels of the above-
named primary creditor, in the said County of (not exempt from
execution), \$ for his said costs, together with the costs of this
precept and your lawful fees in executing the same, and what you shall
have done herein return with this writ within thirty days after the date
hereof.

(Conclude as in other executions.)

(See p. 354.)

152. EXECUTION UNDER RULE 943 (NOW 918) OF THE CONSOLIDATED
RULES OF THE SUPREME COURT OF JUDICATURE OF ONTARIO.

In the Division Court, in the County of

In the matter of the suit in the High Court of Justice for Ontario (or
County Court of the County of).

Between A..... B....., *Plaintiff*,

and

C..... D....., *Defendant*,

and

E..... F....., *Garnishee*.

{ Seal. }

To V..... W....., Bailiff of the said Division Court:—

You are hereby required to levy of the goods and chattels of the
above-named garnishee, in the said County of (not exempt from
execution), \$, money owing from him to the defendant, which has
been attached towards satisfaction of the judgment of the said court in
the said cause, and which, by the order of the judge of the County Court
of the said County of , dated the day of , A.D.
18 , the said garnishee was ordered to pay to the plaintiff.

(Conclude as other forms of execution.)

(See pp. 362, 363.)

153. EXECUTION AGAINST THE GOODS OF CLAIMANT ON INTERPLEADER.

No. A.D. 18 .

In the Division Court, in the County of
 Between A..... B....., Plaintiff,
 and
 { Seal. } C..... D....., Defendant,
 and
 E..... F....., Claimant.

Whereas on the day of , A.D. 18 , the plaintiff duly recovered in said court, holden in and for said division, judgment against the defendant for \$ debt, and \$ costs of suit, which remained unsatisfied (*when the judgment has been revived, add the following words:—* "And on the day of , A.D. 18 , the said judgment was duly revived"), and the said moneys not being paid an execution issued against the goods and chattels of the defendant, under which certain goods and chattels were seized [*if the interpleader was in respect to goods attached, omit all the preceding after the word "claimant," and say in lieu thereof as follows:—* "Whereas a writ of attachment was sued out of this court (or issued by a justice of the peace), under which certain goods and chattels, etc., were seized and attached] to which the above-named claimant made claim, and which claim came on to be heard and decided, upon interpleader summons, at a sitting of this court, held on , at , and at such last-mentioned court it was adjudged, touching the said claim, that the goods [*or the goods, chattels, and moneys, or proceeds of the goods, etc. (as the case may be)*], mentioned in the interpleader summons [*if only for a part of the goods, etc., add the words, "hereafter mentioned, that is to say" (here enumerate them)*], were not the property of E..... F..... (the claimant); and it was ordered that the sum of \$, the costs of that proceeding, should be paid by the said claimant to the clerk in days, for the use of the said plaintiff; and whereas the said sum of \$ has not been paid, pursuant to the said order, you are hereby required to levy of the goods and chattels of the claimant, in the said County of (not exempt from execution), the said sum of \$, and your lawful fees, so that you may have the same within thirty days after the date hereof, and pay the same over to the clerk of this court for the plaintiff.

(Conclude as in other executions.)

(See p. 469.)

154. EXECUTION FOR COSTS.

(Title of Court and Style of Cause.)

{ Seal. }

You are hereby required to levy of the goods and chattels of the defendant (*or the plaintiff*) [not exempt from execution], in the said county, the sum of \$ for certain costs which, by the judgment of the said court given [*or by the order of the judge of the said court*], dated the day of , 18 , were ordered to be paid by the said to the said , and which have been duly taxed and allowed at the said sum, together with your lawful fees. (See p. 372.)

(Conclude as in other executions.)

155. EXECUTION FOR SALE OF PROPERTY SEIZED, BUT UNSOLD FOR WANT OF BUYERS.

(Insert Title of Court and Style of Cause.)

{ Seal. }

Whereas by an execution issued out of the said court, dated the day of , 18 , you were lately required to levy of the goods and chattles of the defendant (or plaintiff) [not exempt from execution], in the said county, the sum of , and your lawful fees, so that you might have that money within thirty days from the said date, and pay the same over to the clerk of this court for the plaintiff (or the defendant), and you, at a day now past, lately returned thereon that by virtue thereof you had taken goods and chattels of the said defendant (or plaintiff) to the value of \$, which said goods and chattels remained in your hands for the want of buyers. (*Here state what the return was, if different in any respect from what is hereinbefore stated.*)

Therefore, you are required to expose for sale and sell the said goods and chattels so taken by you and every part thereof for the best price that can be given for the same, to satisfy the said execution.

In case the said goods and chattels do not sell for a sufficient sum to so satisfy the said execution and your lawful fees, you are required to levy of the other goods and chattels of the defendant (not exempt from execution), in the said county, the residue of the said sum and your lawful fees; so that you may have the same within thirty days, etc.

(Conclude as in other executions.)

(See p. 417.)

156. EXECUTION IN DIVISION COURT FOR ENFORCING ORDER MADE ON APPEAL UNDER "THE ACT RESPECTING MASTER AND SERVANT," R.S.O. CAP. 139 (NOW CAP. 157).

In the Division Court, in the County of
Between A..... B....., *Appellant*,
and
{ Seal. } C..... D....., *Respondent*.

Whereas upon the complaint under oath of the said C..... D....., the servant of the said A..... B....., the said A..... B..... was, on the day of , 18 , before E..... F....., a justice of the peace for the said County of , ordered and adjudged (*here set out the order of the justice. If for payment of wages, state amount and when payable.*)

And whereas the said A..... B....., having duly appealed against the said order or conviction to the said Division Court of the said County of , and the said appeal having been heard before the judge of the said court at a sittings thereof held on the day of , 18 ;

It was thereupon ordered and adjudged by the said court that the said appeal should be dismissed, and that the said order or conviction should be affirmed (*or as the case may be*), and that the said A..... B..... should forthwith pay to the said C..... D..... the sum of \$, being the amount of the said wages and costs so ordered to be paid by the said justice, together with \$, being the costs of and incidental to the said appeal as allowed and taxed. And whereas the said sums so ordered to be paid remain unsatisfied,

You are therefore hereby required to levy of the goods and chattels of the said A..... B....., in the said County of (not exempt from execution), the said moneys, amounting together to the sum of \$, and your lawful fees; so that you may have the same moneys thirty days after the date hereof, and to pay over the same to the clerk of this court for the said C..... D.....

To V..... W....., X..... Y.....,
Bailiff of the said Court. Clerk.

157. EXECUTION AGAINST MARRIED WOMAN.

No., A.D. 18 ..

(Title of Court and Style of Cause.)

{ Seal. }

Whereas on the day of, A.D. 18 .., the plaintiff duly recovered in the said court, holden in and for said division, judgment for \$ and costs, payable out of the separate property of the defendant A..... B....., which remains unsatisfied: You are hereby required of the goods and chattels being the separate property of the defendant A..... B..... (not subject to any restriction against anticipation unless by reason of The Married Woman's Property Act the property shall be liable to execution notwithstanding such restriction), in the said county (not exempt from execution), the said moneys, amounting together to the sum of \$, and your lawful fees.

Conclude as in other forms of execution.)

(See p. 189.)

158. WARRANT TO LEVY A FINE UPON A WITNESS IN COURT WHO REFUSES TO GIVE EVIDENCE.

Whereas H..... H..... being before this court at a sittings thereof, and called upon to give evidence in this cause, did wilfully refuse to be sworn and give evidence without alleging any just ground for such refusal (*or* after being sworn refused to give evidence (*or* to produce), *as the case may be*).

Whereupon it was adjudged and ordered by the court that the said H..... H..... should forthwith (*or* on the day of, A.D. 18 .., *as the case may be*) pay to the clerk of this court a fine of \$ for such neglect (*or* refusal). And whereas the said H..... H..... hath not made such payment: These are therefore (as before *or* as often before) to command you forthwith to make and levy by distress and sale of the goods and chattels of the said H..... H..... (not exempt from execution) the said fine and costs, amounting together to the sum of \$, and your lawful fees; so that you may have the same within thirty days after the date hereof, and to pay the same over to the clerk of the court.

Given under the seal of the court this day of, 18 ..

By order of the judge,

To V..... W....., X..... Y.....,
Bailiff of the said court. Clerk.

Fine \$
 Costs
 Execution.....

Levy the sum of \$
 And your own lawful fees..... \$
 (See pp. 252, 485.)

159. WARRANT TO LEVY FINE UPON WITNESS WHO REFUSED TO BE SWORN UPON HIS ATTENDANCE UPON SUBPENA.

(Insert title of Court and Style of Cause.)

Whereas at a sitting of this court, holden on _____, at _____, in the said county, H..... H....., of _____, *(Here describe the witness as in the subpoena)*, was duly summoned to appear as a witness in this action to give his evidence on the part of the plaintiff *(or defendant)*, and at the time of his being so summoned payment *(or a tender of payment)* of his necessary and reasonable expenses for such attendance was duly made to him according to law, and having appeared did then and there wilfully refuse to be sworn and give his evidence in this action *(or to produce, as the case may be.)*

Whereupon it was adjudged, etc. *(Proceed as in the two next preceding forms, after the word "adjudged" to the end.)*

(See pp. 252, 485.)

160. WARRANT TO LEVY A FINE ON A WITNESS FOR DISOBEDIENCE OF A SUBPENA.

(Insert title of Court and Style of Cause.)

Whereas by a subpoena duly issued under the seal of this court in this cause (bearing date the _____ day of _____, 18____), one H..... H....., of _____ *(here name and describe the person as set forth in the subpoena)*, was duly summoned to appear as witness to give his evidence in this action on the part of the plaintiff *(or defendant)* at a sitting of this court, held at _____ in the said county, on the _____ day of _____, A.D. 18____, (and to produce then and there, *as the case may be*). And whereas it has been duly shown that payment *(or tender of payment)* of his reasonable expenses was duly made to the said H..... H..... at the time of such service. And whereas the said H..... H..... did not appear to give such evidence *(or did not produce before the said, as the case may be)*, in obedience to the said subpoena, but wholly failed therein. And whereas the plaintiff *(or the defendant)* made application to this said court on the _____ day of _____, A.D. 18____, that the said H..... H..... should be fined for such neglect and disobedience by this said court. And whereas notice of the said application was on the _____ day of _____, A.D. 18____, duly served upon the said H..... H..... And afterwards on the _____ day of _____, A.D. 18____ (being the day named in such notice), the plaintiff *(or defendant)* and the said H..... H..... appeared in furtherance thereof, and no cause or excuse* being made to appear to the satisfaction of the court for such non-attendance *(or for not producing the said, as the case may be)* and neglect *(or the said H..... H..... made default and did not appear upon the said notice to show cause to the said application or against his being fined for such neglect, and upon reading the affidavits and papers filed upon the said application showing due service of the said notice)* and no cause or excuse *(proceed from the asterisk* in the next preceding paragraph to the end of it.)*

Whereupon it was adjudged *(proceed as in the next preceding forms from the word "adjudged" to the end.)*

(See pp. 252, 485.)

161. FORM OF EXECUTION IN DETINUE.

(Title of Court and Style of Cause.)

Whereas upon hearing this action of detinue at a court holden at _____ in and for the said division on the _____ day of _____ A.D. 18____, it was adjudged that the plaintiff do recover, and that the defendant do deliver to the plaintiff, the deeds (*or the goods, or chattels, as the case may be*) (*stating particulars thereof*) forthwith, and also that the defendant should pay to the plaintiff the sum of \$ _____, the value of the said goods and chattels, in case the same are not returned, upon your demanding the same, and also the sum of \$ _____ for costs of said plaintiff, and if the defendant does not return to you the said deeds (*or the said goods and chattels*), forthwith, or pay the said damages and costs upon demand, you are therefore required and ordered that, without delay, you cause the same to be returned to the plaintiff, and that if the said deeds, goods, or chattels cannot be found in the said county then that you levy of the goods and chattels of the defendant in the said county (not exempt from execution) the said moneys, amounting altogether to the sum of \$ _____, and your lawful fees, so that you may have the same within thirty days after the date thereof, and pay the same over to the clerk of this court for the plaintiff.

Given under the seal of the court this _____ day of _____, A.D. 18____.
To V..... W.....
Bailiff of the said Court.

X..... Y.....
Clerk.

(Add memo. as in form 132.) (See pp. 221, 222.)

162. WARRANT OF COMMITMENT IN DEFAULT OF APPEARANCE.

No. _____, A.D. 18____.

In the _____ Division Court, in the County of _____

Between A..... B....., Plaintiff,
{ Seal. } and
C..... D....., Defendant.

To V..... W....., Bailiff of the said court, and to all constables and peace officers of the County of _____, and to the gaoler of the common gaol of the said County of _____

Whereas at the sittings of this court (*or of the _____ Division Court for, etc.*) holden at _____, on the _____ day of _____, 18____, the plaintiff, by the judgment of the said court, in a certain suit wherein the court had jurisdiction, recovered against the defendant the sum of \$ _____ for his debt (*or damages*) and costs of suit, which were ordered to be paid at a day now past. And whereas the defendant, not having made such payment upon application of the plaintiff, a summons was duly issued from and out of this court against the defendant, by which summons the defendant was required to appear at the sittings of this court holden at _____ on, etc., to answer such questions as might be put to him touching (*set out as in the summons*).^{*} And whereas it was duly proved on oath, at the said last-mentioned sittings of this court, that the defendant was personally served with the said summons. And whereas the defendant did not attend, as required by such summons, nor allege any sufficient cause for not so attending. And whereas it appeared to

the satisfaction of the judge that such non-attendance was wilful (*or*, "whereas the defendant has failed to attend after being twice so summoned").

And thereupon it was ordered by the judge of this court that the defendant should be committed for the term of _____ days to the common gaol of the said county, according to the form of the statute in that behalf, or until he should be discharged by due course of law: These are therefore to require you, the said bailiff and others, to take the defendant and to deliver him to the gaoler of the common gaol of the said county; and you, the said gaoler, are hereby required to receive the defendant, and him safely to keep in the said common gaol for the term of _____ days from the arrest under this warrant, or until he shall be sooner discharged by due course of law, according to the provisions of the Act of Parliament in that behalf; for which this shall be your sufficient warrant.

Given under the seal of the court this _____ day of _____ A.D. 18 _____

X..... Y.....,
Clerk.

Debt and costs up to the time of the delivering
of this warrant for execution.....\$
(See p. 425.)

162a. WARRANT OF COMMITMENT AFTER EXAMINATION.

In the _____ Division Court, in the County of _____

(*As in last form, down to the asterisk,* and conclude as follows:—*)

And whereas the defendant, having duly appeared at the said court pursuant to the said summons, was examined touching the said matters. And whereas it appeared on such examination that [*here insert the particular ground of commitment in the language used in the statute, e.g., "C..... D....., the defendant, incurred the debt (or liability), the subject of this action, under false pretences" (or by means of fraud or breach of trust)*].

And thereupon it was ordered by the said judge that the defendant should be committed for the term of _____ days to the common gaol of the said county, according to the form of the statute in that behalf, or until he should be discharged by due course of law.

These are therefore to require you, the said bailiff and others, to take the said defendant, and to deliver him to the gaoler of the common gaol of the said county; and you, the said gaoler, are hereby required to receive the defendant, and him safely keep in the said common gaol for the term of _____ days from the arrest under this warrant, or until he shall be sooner discharged by due course of law, according to the provisions of the Act of Parliament in that behalf; for which this shall be your sufficient warrant.

Given under the seal of the court this _____ day of _____, A.D. 18 _____

X..... Y.....,
Clerk.

Debt and costs up to the time of the delivery
of warrant of execution.....\$
(See pp. 425, 432.)

Pursuant to the provisions of The Division Courts, Acts, I, X.....
Y....., clerk of the said court, do certify that the above transcript is
correct, and duly taken from the procedure book of the said court, and
that judgment in the above cause was recovered at the date above stated,
viz., the day of , 18 ; and, further, that the amount unpaid
on said judgment is \$, as stated below.

Given under the seal of the said court the day of , A.D. 18 .

X..... Y.....,
Clerk.

Amount of judgment.....\$
Debt.....
Costs.....
Total.....\$
Additional costs.....
" interest.....
Total.....\$
Paid.....
Amount due.....\$

To R..... S.....,
Clerk of Division Court, County of
(See p. 387.)

164a. TRANSCRIPT TO COUNTY COURT OF JUDGMENT ON SPECIAL SUMMONS.

(Obsolete. For form of execution against lands, see Schedule D.
p. 505.)

164b. TRANSCRIPT OF JUDGMENT ON ORDINARY SUMMONS FROM ONE DIVISION COURT TO ANOTHER.

In the Division Court, in the County of

Transcript of the entry of a judgment recovered on the day of
 , A.D. 18 , in the said court, holden in and for said division,
in a suit numbered , A.D.

{ Seal. } Between A..... B....., Plaintiff,
and
C..... D....., Defendant.

Amount of Judgment:	Judgment for plaintiff for \$ debt, and \$, costs of suit; execution issued on the day of , A.D. 18 , and returned on the day of , A.D. 18 (here state the return). (If the judg- ment was revived, add the following words, "and on the day of , A.D. 18 , the said judgment was duly revived.") Pur- suant to the provisions of The Division Courts Acts. I, X..... Y....., Clerk of the said Division Court, do certify that the above transcript is correct, and duly taken from the procedure book of the said court, and that judgment in the above cause was recovered at the date
Debt.....\$	
Costs.....	
Additional	
Costs.....\$	
Total..\$	
Amount paid \$	
18	
Total paid.....\$	
Amount due..\$	

above stated, viz.: the day of A.D. 18 , and, further,
that the amoun unpaid on said judgment is \$, as stated in the
margin hereof.

Given under the seal of the said court this day of , A.D. 18 .

To X..... Y.....,
Clerk of the Division Court in the County of Clerk.
(See p. 387.)

INTERPLEADER.

165. APPLICATION OF BAILIFF FOR INTERPLEADER.

(Insert Title of Court and Style of Cause.)

By virtue of a writ of execution (or "attachment") in this cause, dated the day of , 18 , from this court, I did, on the day of , 18 , seize and take in execution (*specify goods, chattels, etc., seized*), as the property of the defendant. E..... F....., of the Township of , etc., now claims the same as his property (or now claims the said and as his property) and that the value thereof is \$, you will therefore be pleased to issue an interpleader summons to the plaintiff and to the said E..... F....., according to the statute in that behalf.

Dated , 18

V..... W.....,
Bailiff.

To the clerk of the said Court. (See p. 463.)

166. LANDLORD'S CLAIM FOR RENT UNDER SECTION 269 (NOW 277.)

Whereas I have been informed that you have seized the goods of C..... D....., of , on the premises at , to satisfy a certain judgment of the Division Court in against the said C..... D....., at the suit of A..... B....., I hereby give you notice that I am the landlord of the said premises, and that I claim \$ for rent now in arrear, being for one (*or as the case may be*), and I require you to pay the same to me before you apply the proceeds of the sale of said goods or any part thereof to satisfy the said judgment.

Dated, etc.

E..... F.....,
Landlord of said Tenement.

To V..... W.....,
Bailiff of, etc.

(See p. 465.)

167. SUMMONS IN INTERPLEADER.

No. , A.D. 18 .

In the

Division Court, in the County of

Between HENRY BRAY, *Plaintiff*,

and

JOHN NOKES, *Defendant*,

and

ROBERT ROY, *Claimant*.

You, the said Robert Roy, are hereby summoned to appear at the sitting of this court, to be holden on Friday, the first day of November, A.D. 18 , at the hour of ten o'clock in the forenoon, at the township hall, in the Village of Markham, in the said county, touching a claim made by you to certain goods and chattels and cattle (or moneys, or securities, *as the case may be*) viz. :—(*here specify the goods, etc., claimed*), seized and taken in execution (or attached), under process issued out of this court in this action (or by attachment issued by G. R., a justice of the peace), at which time and place you will be required to maintain your claim to the said goods and chattels, and in default of your then establishing such claim the said goods and chattels will be sold (or the said moneys be paid and delivered over) according to the urgency of the said process.

And take notice that you are required, within five days after the day of service hereof upon you, to deliver or leave at the clerk's office particulars of the goods and chattels (*as the case may be*) so claimed by you, and the grounds of your claim.

And you, the said Henry Bray, are also hereby summoned to appear at the said sitting of the said court, and maintain your right to have the said goods, etc., (*or as the case may be*) sold to satisfy your claim.

And all the said parties are required to take notice that every claim will, at the said sitting of the said court, be adjudicated upon.

Given under the seal of the court this day of January, A.D. 18 .

(See pp. 463, 464, 471.)

R. ROE,
Clerk.

NOTICE TO THE PARTIES.

Where, under sub-section 3 of section 269 (now 277) of the Act, the claimant to goods taken under process claims damages from the creditor, or from the bailiff, or in respect of the seizure of the property, he shall in the particulars of his claim to the goods state the amount he claims for damages, and the grounds upon which he claims such damages.

Where a creditor claims damages against a bailiff arising out of the execution of any process, he shall, five clear days before the day upon which the interpleader is to be tried, deliver to the bailiff a notice of such claim, stating the grounds and amount of such claim.

(Add also memorandum, form 51.)

168. PARTICULARS OF CLAIM IN INTERPLEADER.

In the First Division Court in the County of Brant.

Between AARON BURR, *Plaintiff*,

and

COLIN DUFFY, *Defendant*.

and

EDGAR FRENCH, *Claimant*.

To whom it may concern:—

Edgar French, of _____, claims as his property the following goods and chattels (or moneys, etc.), seized and taken in execution (or attached), as it is alleged, namely: (*specify the goods and chattels, or chattels or moneys, etc., claimed, and the grounds of claim are (set forth in ordinary language the particulars on which the claim is grounded, as how acquired, from whom, when, and the consideration paid or to be paid, and when), and this the said Edgar French will maintain and prove.*

E. FRENCH.

Dated this _____ day of _____, 18 ____.

N.B.—If any action for the seizure has been commenced, state in what court and how the action stands.

Where damages claimed, add claim therefor: see Rule 35a; for form, see Form 313.

(See p. 465.)

169. ADJUDICATION ON INTERPLEADER.

Adjudged, that the goods [or the goods, chattels, and moneys, or proceeds of the goods, etc., (*as the case may be*)] mentioned in the interpleader summons [*if only for a part of the goods, etc., add the words, "hereafter mentioned, that is to say (here enumerate them)"*] are (or are not) the property of E..... F..... (the claimant), or that rent to the amount of \$ _____ is due to E..... F..... (the claimant): Ordered that \$ _____, the costs of this proceeding, be paid by (*here insert such order as the costs or the subject in dispute, if any, as the judge shall have made*) in days. (See pp. 459, 468, *et seq.*)

WHERE DAMAGES CLAIMED OR ADJUDGED.

It is also adjudged that the said E.....F..... (the claimant) has sustained damages arising or capable of arising out of the execution of the process by which said (*or as the case may be*) were taken in execution (*or attached*) to the amount of \$ _____, and that the same is recoverable from and payable by A..... B..... (the execution creditor, or L. M....., the bailiff) to the said E..... F..... (the claimant), and which said sum is hereby ordered to be paid forthwith (*or as the case may be*.) (See p. 459.)

170. WHERE BOTH GOODS AND DAMAGES ARE CLAIMED, AND THE CLAIM TO NEITHER IS ESTABLISHED.

Adjudged, touching the claim of E..... F..... to certain goods, etc. (*as in the preceding form*), and for damages arising out of the said execution, referred to in the interpleader summons, and which E..... F..... claims against (the execution creditor) and the bailiff of the court that the said goods, etc. (*or moneys*), or part thereof (*describe the part*), are the property of (execution debtor), and that the said E..... F..... is not entitled to receive any damages from either (the execution creditor), or the said bailiff: Ordered that the costs, etc. (*as in the preceding form*). (See p. 459.)

171. WHERE BOTH GOODS AND DAMAGES ARE CLAIMED, AND THE CLAIM TO BOTH IS ESTABLISHED.

Adjudged, touching the claim of E..... F..... to certain goods, etc. (*as in form 169*), and for damages arising (*same as in form 170*), that the said goods and chattels (*or moneys*), or part thereof (*specifying them*), are the property of E..... F....., and that E..... F..... is entitled to recover the sum of \$ for damages arising out of the said execution against the bailiff of this court: Ordered that the bailiff of this court do pay the said E..... F..... the sum of \$ for damages, and the sum of \$ for costs, and the said A..... B..... (the execution creditor) do pay the said E..... F..... the sum of \$ for costs. (See p. 459.)

172. WHERE BOTH GOODS AND DAMAGES ARE CLAIMED, AND MONEY IS PAID INTO COURT, IN RESPECT OF THE LATTER, AND THE CLAIM TO THE GOODS IS ESTABLISHED, AND THE MONEY PAID INTO COURT IS FOUND TO BE SUFFICIENT TO SATISFY THE DAMAGES.

It is adjudged (*proceed here as in form 169*), and for damages arising out of the said execution, and which E..... F..... claimed against E..... G....., the bailiff of this court, and in respect of which he hath paid into court the sum of \$ that the said goods and chattels, etc. (*or moneys*, etc.) or part thereof (*specifying them or it*), are the property of E..... F..... but that the said sum paid into court is sufficient to satisfy all damages arising out of the said execution: Ordered that A..... B..... (the execution creditor) do pay to the said E..... F..... for her costs, and that E..... F..... do pay to the said E..... G....., the said bailiff, the sum of \$ for her costs.

(Conclude as in form 169.)

(The foregoing form 172 may be adapted to the case where money is paid into court in respect of damages or the claim to the goods is established and the money paid into court is adjudged insufficient): Ordered that A..... B..... (the execution creditor) do pay the sum of \$ for costs, and that E..... G....., the said bailiff, do pay the said E..... F..... the further sum of \$ for damages, and also the sum of \$ for costs.

(Conclude as in form 169, ante.) (See p. 459.)

173. ADJUDICATION FOR DAMAGES, IN A CASE WHERE THE EXECUTION CREDITOR RECOVERS AGAINST THE BAILLIFF, WHO PAYS MONEY INTO COURT.

Adjudged touching the claim, etc. (*as in preceding forms*), and in respect of damages arising out of an execution in this action, in which process given from the court at the instance of the said A..... B..... (the execution creditor), directing the said bailiff to this court to levy the sum of \$ of and from the goods and chattels of C..... D..... (the execution debtor), and in respect of which damages E..... G....., the bailiff of this court, hath paid into court the sum of \$ that the sum paid into court is not sufficient to satisfy all damages arising out of the said execution (*or that the sum paid into court is not sufficient to satisfy the damages arising out of the said execution*), and that the said A..... B..... (the execution creditor) is entitled to recover the further sum of \$ for damages from the said E..... G....., the said bailiff: Ordered that the said A..... B..... do pay the said E..... G..... the sum of \$ for costs (*or that the said E..... G..... do pay to the said A..... B..... the further sum of \$ for damages, and also \$ for costs*).

(*Conclude as in form 169.*) (See p. 459.)

174. WHERE BOTH GOODS AND DAMAGES ARE CLAIMED, AND THE CLAIM TO THE GOODS IS, BUT THAT TO DAMAGE IS NOT, ESTABLISHED.

Adjudged, touching the claim of E..... F..... to certain goods, etc. (*as in form 169*), and for damages, etc. (*as in form 170*), but that the said E..... F..... is not entitled to recover any damages from either the said A..... B..... (the execution creditor) or the said bailiff: Ordered that A..... B..... (the execution creditor) do pay to the said E..... F..... the sum of \$ for the costs, and that the said E..... F..... do pay to the said bailiff the sum of \$ for his costs of defending the said claim for damages.

(*Conclude as in form 169.*) (See p. 459.)

175. WHERE BOTH GOODS AND DAMAGES ARE CLAIMED, AND THE CLAIM TO THE GOODS IS NOT, BUT THE CLAIM TO DAMAGES IS, ESTABLISHED.

Adjudged, touching the claim of E..... F....., etc. (*as in preceding form 169*), that the said goods and chattels, etc. (*as in preceding form 169*), are the property of the said C..... D..... (the execution debtor), and that the said E..... F..... (the claimant) is entitled to recover \$ for damages from the said bailiff of this court, but not any damages from A..... B..... (the execution creditor): Ordered that the said E..... F..... do pay to the said A..... B..... the sum of \$ for his costs, and that the said bailiff of this court do pay to the said E..... F..... the sum of \$ for damages, and \$ for costs.

(*Conclude as in form 169.*) (See p. 459.)

(*From the foregoing, forms may easily be framed to suit other circumstances, as where the execution creditor makes claim for damages from the bailiff; and the claim to damages is established, or where it is not established.*)

EXAMINATIONS, NEW TRIALS, AND REFERENCES.

176. NOTICE OF APPLICATION FOR ORDER TO EXAMINE SICK, AGED, OR INFIRM WITNESS.

(Insert title of Court and Style of Cause.)

Take notice, that a motion will be made on behalf of the above-named plaintiff (or defendant) to the judge of the court, at his chambers in the Court House, in the City of Hamilton (or as the case may be), on the _____ day of _____, 18____, at _____ o'clock in the forenoon, or so soon thereafter as the motion can be heard, for an order under the 137th (143rd) section of The Division Courts Act to examine E..... F....., etc., a material and necessary witness in this cause for the plaintiff (or defendant), under the provisions of said section, and that on such motion will be read the affidavits of _____, true copies of which are hereto annexed.

Dated the _____ day of _____, 18____.

(Signature of the party, his solicitor, or agent.)

To _____
(Name of party to whom notice given.) (See p. 259).

177. ORDER FOR EXAMINATION OF SICK, AGED, OR INFIRM WITNESS, WHERE BOTH PARTIES APPEAR.

(Insert title of Court and Style of Cause.)

Upon application of the above-named plaintiff (or defendant) in this cause, and upon reading the affidavit of _____, filed herein, notice of application and affidavit of service thereof, and a copy of said affidavit of the said _____, on the defendant (or plaintiff) in this cause, and upon hearing the parties by their solicitors (or agents);

It is ordered that G..... H....., of, etc., do take evidence on oath of E..... F....., of, etc., a witness on behalf of the plaintiff (or defendant), pursuant to the 137th section of The Division Courts Act, at such time and place as the said G..... H..... may by writing appoint, and shall reduce such evidence to writing, and cause the same to be signed by the said E..... F....., and when so signed shall duly transmit the same to the clerk of this court.

It is further ordered that the defendant (or plaintiff), his solicitor or agent, shall have two days' notice of the time and place of such examination; that the costs of this order and the costs of the examiner be reserved until the trial of this cause. *(Any other terms may be here inserted.)*

Date _____

(See p. 259.)

Judge.

178. ORDER FOR NEW TRIAL.

In the _____ Division Court, in the County of _____
Between A..... B....., Plaintiff,
and
C..... D....., Defendant.

It is ordered that the judgment rendered in this cause, and all subsequent proceedings, be set aside, and a new trial be had between the parties on *(set out the terms and conditions, if any, on which the order is made.)*

Dated _____, 18____.

(See pp. 284, 290.)

Judge.

At the sittings of this court, held on the _____ day of _____, 18____, at _____, in the said division, this case came on to be heard, and judgment was rendered for the _____ for \$ _____.

(Here set forth the nature of the order as in form 91.)

(See pp. 284, 289.)

(After entering the judgment first rendered, proceed as follows:—)

The defendant (or plaintiff, as the case may be) made application for a new trial, and the judge, instead of granting the same ordered that judgment be entered as follows:—

It is adjudged, etc. (here set forth that part of the judge's order which directs how judgment is to be entered). (See p. 284.)

In the Division Court, in the County of

{
Seal.
}

Between A..... B....., *Plaintiff.*
and
C..... D....., *Defendant.*

By consent of the plaintiff and defendant (or their solicitors, or as the case may be), given in open court (or produced in writing to the court). It is ordered that all matters in difference in this cause (and if consented to add, "and all other matters within the jurisdiction of this court in difference between the said parties") be referred to the award of (if there be three arbitrators, here insert, or of any two of them) , so as said award be made in writing, ready to be delivered to the parties entitled to the same on or before the day of , or such further day as the said arbitrator may, by writing under his hand, endorsed hereof, enlarge the time for making his said award, and that the said award may be entered as the judgment in this cause (add any terms that the judges may prescribe, or the parties may agree upon, such as in form 185).

Dated this day of , 18

X..... Y.....
Clerk.

(See p. 365.)

182. APPOINTMENT OF THIRD ARBITRATOR OR UMPIRE TO BE ENDORSED.

We hereby appoint _____, of, etc., as a third arbitrator with us for determining the matters in dispute within referred to us.

Or, We hereby appoint _____, of, etc., as an umpire as to certain differences of opinion which have arisen between us as arbitrators of the matters within referred. (See pp. 365, 366.)

183. APPOINTMENT FOR MEETING ON REFERENCE.

In the, etc. (state Title of Court and Style of Cause).

B..... } I appoint the day of next, at the
v. } hour of at
D..... } reference. , for proceeding on this

To (both parties), ... Arbitrator.

184. ENLARGEMENT TO BE ENDORSED.

I enlarge the time for making my award respecting the matters referred to me by the within order of reference until the day of , 18 ..

Dated, etc.
(See p. 368.) Arbitrator.

185. ORDER OF REFERENCE CONTAINING SPECIAL CLAUSES.

(Commence as in form 181.)

{ Seal. }

1. The said arbitrator to have power, by writing, signed by him, from time to time, to enlarge the time for making his award.

2. That if either of the parties be dead before the making of the award that the same may be afterwards delivered to their respective personal representatives who shall require the same.

3. That the cost of the reference and award shall be at the discretion of the said arbitrator (or as the case may be).

4. That the arbitrator shall be at liberty to order and determine what he shall think fit to be done by either of the parties respecting the matters referred.

5. That the witnesses and parties shall be examined by the arbitrator on oath.

6. That the arbitrator shall be at liberty to proceed *ex parte* in case either party, after reasonable notice, shall, at any time, neglect or refuse to attend on the reference.

7. That the parties respectively shall produce before the arbitrator all books, deeds, papers, accounts, vouchers, writings, and documents within their possession or control, which the arbitrator may require and call for as in his judgment relating to the matter referred.

8. That neither party shall wilfully or wrongfully do, or cause to be done, any act to delay or prevent the arbitrator from making his award.

9. That neither of said parties shall bring or prosecute any action against the arbitrator concerning the matters referred.

10. That if either party shall, by affected delay or otherwise, wilfully prevent the arbitrator from proceeding in the reference, or from making his award, he shall pay such costs to the other as the arbitrator shall think reasonable.

11. The said parties jointly and severally agree with the said arbitrator, in consideration of his taking upon himself the burthen of the reference, to pay him his reasonable charges for the arbitration and award.

(Here add any other terms that the judge may prescribe or the parties may agree upon.)

Given under the seal of the court this day of , 18 ..
R. ROE,
Clerk.

(See p. 365.)

186. AWARD.

After hearing and considering the proofs laid before me (*or us*) in the matter of the within reference, and in full determination of the matters to me (*or us*) referred, I (*or we*) do award that the within-named A B is entitled to recover from the within-named C D the sum of , together with the costs of this suit, and also , the costs of this reference (*or as the case may be*), and that the same shall be paid by the said C D within days, and that judgment be entered in the within-mentioned case accordingly.

Dated this day of , 18 ..

Witness:

}

..... Arbitrator.

(Add affidavit of execution, form 35.) (See pp. 367, 368.)

187. BOND ON SUPERSEDEAS TO WARRANT OF ATTACHMENT.

(Insert Title of Court and Style of Cause.)

Know all men by these presents, that we, C D of (*insert place of residence and addition*), the above defendant E F of, etc., and G H of, etc., are, and each of us is, jointly and severally held and firmly bound to A B of, etc., the above plaintiff, in the sum of , to be paid to the said plaintiff, his certain attorney, executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, and each and every of us binds himself, his heirs, executors, and administrators firmly by these presents.

Sealed with our respective seals, and dated the day of , 18 ..

Whereas the above-named plaintiff hath sued out a warrant of attachment against the goods and chattels of the defendant for the sum of and under and by virtue of the said attachment certain goods and chattels of the defendant, to wit: (*specify property seized*), have been seized and attached; and the defendant desires that the said warrant be superseded, and the property, so attached, restored to him under the provisions of the 259th (now 267th) section of The Division Courts Act;

Now the conditions of this obligation is such that if the said defendant, his heirs, executors, or administrators, do and shall, in the event of the claim in the said cause being proved, and judgment being recovered thereon, as in other cases, where proceedings have been commenced against the person, pay the same, or pay the value of the said property, so taken and seized as aforesaid, to the plaintiff, his executors or administrators, or produce such authority whenever thereto required to satisfy such judgment, then this obligation to be void; else to remain in full force and virtue.

Sealed and delivered
in presence of

}

C D [L.S.]

G H [L.S.]

E F [L.S.]

(Add affidavit of execution, form 35.) (See p. 452.)

[illegible]

Know all men by these presents, that we A..... B....., of (insert place of residence and addition), the above-named plaintiff, E..... F....., of, etc., and G..... H....., of, etc., are, and each of us is, jointly and severally held and firmly bound to C..... D....., the above-named defendant, in the sum of \$ (double value of the appraised property), to be paid to the defendant, his certain attorney, executors, administrators, and assigns, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, and each and every of us binds himself, his heirs, executors, and administrators, firmly by these presents.

Sealed with our respective seals, and dated this day of
A.D. 18 .

Whereas the above-named plaintiff hath sued out of the said court (*or* from a justice of the peace) a warrant of attachment against the goods and chattels of the defendant, and hath requested that certain perishable property, to wit: (*specify property*), belonging to the defendant, may be seized, and forthwith exposed and sold, under and by virtue of the said warrant of attachment [*or* whereas certain perishable property, to wit: _____, belonging to the defendant, hath been seized under and by virtue of a warrant of attachment, issued out of the said court (*or* by a justice of the peace) in the above-named cause, and hath been duly appraised and valued at the sum of \$ _____ and is now in the hands of the clerk of the said court; and whereas the plaintiff hath requested the said clerk to expose and sell the said goods and chattels as perishable property], according to the form of the statute in that behalf:

Now the condition of this obligation is such, that if the said plaintiff, his heirs, executors, or administrators, do repay to the said defendant, his executors or administrators, the value of the said goods and chattels, together with all costs and damages that may be incurred in consequence of the seizure and sale thereof, in case judgment be not obtained by the plaintiff, according to The Division Courts Act, then this obligation to void; else to remain in full force and virtue.

Sealed and delivered in presence of	)	G..... B..... [L.S.]
		E..... F..... [L.S.]
		G..... H..... [L.S.]

(See pp. 453, 455.)

189. BOND FOR SECURITY FOR COSTS, WHERE PLAINTIFF OUT OF ONTARIO.

Insert title of Court and Style of Cause.

Know all men by these presents (proceed with penal part of bond as in ordinary cases),

Whereas an action (or plaintiff) was upon the _____ day of _____, A.D. 18 _____, entered by the above-named plaintiff against the above-named G..... H..... in the First Division Court of the County of Brant.

And whereas it has been made to appear that the said plaintiff does not reside in the province, and it has been ordered that proceedings herein shall be stayed until security for costs of the defendant shall have been given to the satisfaction of the clerk of the said court, or until deposit of a sufficient sum to meet and pay the said costs shall have been made with the clerk of the said court; and no such deposit having been made.

And whereas the said plaintiff and the above-bounden C..... D..... and E..... F....., as sureties for the said plaintiff, have agreed to give such security pursuant to the said order by entering into this obligation with the condition hereunder written; and this security has been approved by the clerk of the said court.

Now the condition of this obligation is such that if the said plaintiff, or any plaintiff substituted in his stead, discontinues, become non-suit in the said action, or in case the said action is referred to arbitration, and an award is made against the said plaintiff, or any substituted plaintiff therein, showing that he is not entitled to recover therein, or if the said defendant, or any substituted defendant, obtain adjudgment, or verdict, or award therein, then or in either of the said cases of the above-bounden A..... B....., C..... D....., and E..... F....., or either of them, their or either of their heirs, executors, or administrators do pay or cause to be paid to the said defendant, his executors, administrators, or assigns, his or their costs to be taxed in the said action, then this obligation to be void and of no effect, or otherwise to remain in full force and virtue.

Sealed with our seals and dated this day of , A.D. 18 .

Signed, sealed, and delivered
in presence of

A..... B.....

{ Seal. }

C..... D.....

{ Seal. }

E..... F.....

{ Seal. }

(See pp. 270, 272.)

CONSENTS AND AGREEMENTS.

190. CONSENT TO AN APPEAL UNDER SECTION 148 (NOW 154) OF THE ACT, SUB-SECTION 2.

(Insert title of Court and Style of Cause.)

We hereby consent that this cause may be entered, heard and disposed of in the Court of Appeal for Ontario, pursuant to the provisions of section 148 of the Division Courts Act.

Dated, etc.

(Signed by the parties, their counsel or solicitors.)

(See pp. 292, 298.)

FORMS—JURISDICTION, UNDERTAKING BY NEXT FRIEND. 659

191. CONSENT TO TRY CASE IN DIVISION COURT.

(Insert title of Court and Style of Cause.)

We hereby consent to this cause being entered, tried and finally disposed of under the 91st to 95th sections of The Division Courts Act, in the Division Court of the County of

Dated, etc.

A..... B.....

C..... D.....

(Or by their counsel, solicitor or agents.)

(See now Sec. 95, p. 152.)

192. AGREEMENT NOT TO APPEAL.

(Insert title of Court and Style of Cause.)

We hereby agree not to appeal, in this cause, to the Court of Appeal against the decision of the judge to be made herein.

Dated this day of , A.D. 18 .

A..... B.....

C..... D.....

(See pp. 211, 212.)

JURISDICTION.

193. CONSENT TO GIVE JURISDICTION TO THE DIVISION COURT UNDER CLAUSE (a) OF SUB-SECTION 1 OF SECTION 70, AS AMENDED BY 56 VICT., CAP. 15 (NOW SEC. 72 (b).)

(Title of Court and Style of Cause.)

We (or the respective solicitors of), A..... B..... and C..... D....., do hereby agree that the First Division Court of the County of Brant, holden at the City of Brantford, in the said county, shall have power to try an action (or this action) to be brought by the said A..... B..... against the said C..... D....., for (here state the cause of action), under the provision of clause (a) [now clause (b)] of sub-section 1 of section 70 (now 72) of the Division Courts Act; the amount claimed not exceeding \$100.

Witness our hands this day of , A.D. 18 .	}	A..... B..... (or E..... F....., So-
		licitor for A..... B.....).
		C..... D..... (or G..... H....., So-
		licitor for C..... D.....).

(See pp. 82, 85.)

194. UNDERTAKING BY NEXT FRIEND OF INFANT TO BE RESPONSIBLE FOR DEFENDANT'S COSTS.

In the Division Court, in the County of

I, the undersigned E..... F....., being the next friend of A..... B....., who is an infant, and who is desirous of entering a suit in this court against C..... D....., of, etc., hereby undertake to be responsible for the costs of the said C..... D..... in such cause, and that if the said A..... B..... fail to pay the said C..... D..... all such costs of such cause as the judge shall direct him to pay to the said C..... D..... I will forthwith pay the same to the clerk of the court.

Dated this day of , 18 .

Witness:

(See p. 117.)

(Signed) E..... F.....

NOTICES BY CLERK.

195. FOR CLERK'S NOTICES TO THE PLAINTIFF.

No. , A.D. 18 .

In the Division Court, in the County of
 Between , Plaintiff
 and
 , Defendant.

Take notice that the defendant* has given a confession for the full amount of your claim.

*Or, *Disputes your claim (or does not dispute your claim.)*

*Or, *Disputes the following items of your claim, viz.: (here specify the items set forth in the defendant's notice to the clerk), and admits the residue and you are required forthwith to say in writing if you are willing to take judgment for the part admitted.*

*Or, *Will on the trial claim a set-off against your demand, and the particulars thereof are hereunto annexed.*

*Or, *Will at the trial insist that your claim is barred by the Statute of Limitations (or other statutory defence not herein specified.)*

*Or, *Will on the trial insist that he is discharged from payment of your claim by the provisions of the Insolvent Act.*

*Or, *Will admit on the trial the 1st, 9th, 11th (or other items of your particulars of account to be correct.*

*Or, *Will admit on the trial the signing (or endorsement) of the promissory note (or bill of exchange) sued upon (or as the case may be), and denies the residue of your claim.*

*Or, *Has paid into court the sum of \$, together with \$, for costs of suit incurred up to the day of such payment in full satisfaction of your claim, which will be paid to you upon demand at my office; and all proceedings in the action will be stayed, unless within three days after you receive this notice you signify to me your intentions to proceed for the remainder of your demand; and in case you either accept or refuse the same in full, you must give a written notice to that effect to me within the said three days, otherwise you will be liable to pay to the defendant such subsequent costs as he may incur in this action.*

*Or, *Has pleaded that he duly tendered to and offered to pay you before this action was brought the sum of \$, in full satisfaction of your claim, and has filed a plea of such tender in my office, and paid that sum into court, pursuant to the 122nd (now 128th) section of The Division Courts Act, and that sum will be paid to you, less one dollar, in case you do not wish to further prosecute your suit, and all proceedings in the actions will be stayed, unless you signify to me within three days from the time you receive this notice your intention to proceed for your demand, notwithstanding such plea.*

*Or, *Will on the trial insist that you are not a duly certified solicitor (or not a licensed veterinary, or auctioneer, etc. (as the case may be.)*

*Or, *Will insist as a defence upon the trial that you have not given the proper notice of action before suit to which the defendant is entitled as a justice of the peace (or peace officer, or as a bailiff of the Division Court under the 290th (now 298th) section of the Division Courts Act.)*

*Or, *Defends this action under the protecting clauses of The Division Courts Act, viz.: sections 285, 286, 287, 288, 289, 290, 291, 292, etc. (now secs. 283-300.)*

*Or, *Has paid into court the full amount of your demand, together with your costs herein (or has paid into court \$, part of your claim.*

*Or, *Has filed a statement confessing and admitting \$, part of the amount claimed by you (and proposing to pay the same by instal-*

ments of \$. If you consent to accept the amount so admitted (and to the mode of payment by instalment as proposed), it will not be necessary for you to attend on the day of hearing. If, however, you do not consent to accept the sum so admitted in satisfaction of your claim, you must be prepared to prove the same at the sittings of the court to be held on the day of , A.D. 18 .

*Or, *Disputes your claim in part only, viz.: (here specify the parts disputed as set forth in defendant's notice), and he admits the residue to be correct, you are therefore required to notify me to say in writing if you are willing to take judgment for the part undisputed; and if you fail to do so it will be assumed that you seek to recover your whole claim, in which case you must proceed to the trial of this cause at the next sittings of this court, to be held on the day of , 18 .*

*Or, *Q..... R..... and O..... K....., two of the defendants, have been served with the summonses in this cause, but have not given any notice disputing your claim that H..... J..... and L..... T....., two other of the defendants, have not been served with the summons, but have given a confession of the debt.*

*Or, *Has withdrawn his defence and consents that judgment be entered against him for the sum of \$ and costs.*

*Or, *Take notice that the defendant intends at the hearing of this action to give in evidence and rely upon the following grounds of defence* (here state grounds of defence; see forms following which are suggested and may be varied to suit circumstances).*

*Or, *That the defendant was an infant, within the age of twenty-one years, when the supposed claim arose (or the supposed contract or agreement was made), and that he was born, as he believes, at , in the county of , on the day of , 18 .*

*Or, *That the defendant was discharged by composition, or scheme of arrangement with his creditors, on the day of , 18 .*

*Or, *That no notice of action was given to the defendant pursuant to the statute , Viet., chap.*

*Or, *That the defendant intends to set up a counterclaim against the plaintiff's demand, the particulars of which are annexed hereto (the clerk is to annex to this notice the particulars of set-off or counterclaim as furnished by defendant, and is to seal with the seal of the court the notice and particulars filed in the court).*

*Or, *That the defendant intends to rely as a matter of equitable defence on the facts set forth in the statement hereunder written:*

The facts constituting the equitable defence to this action are as follows:

—(Here set out the facts as concisely as possible, and number the paragraphs as in an affidavit.)

*Or, *That the defendant has paid into court the full amount of your demands, together with your costs herein.*

196. ACCEPTANCE OF MONEY PAID INTO COURT.

(Insert title of Court and Style of Cause.)

Take notice that the plaintiff accepts the sum of \$ paid by you into court in satisfaction of the claim in respect of which it is paid in.

Dated the day of , 18 .

N..... G.....,
Clerk.

To the said defendant. (See p. 226.)

197. CLERK'S NOTICE OF TRIAL BY JURY AND NEW TRIAL.

(Insert title of Court and Style of Cause.)

Take notice that this cause will be tried by a jury, the plaintiff (or defendant) having demanded a jury therein; or take notice that the judge has ordered a new trial upon payment of costs (or with costs to abide the event, or as the case may be), and has ordered the next trial to be had before a jury (or as the case may be), and that such trial will be held at the town hall in Paris on _____, the _____ day of _____, A.D. 189____, at the hour of _____ o'clock a.m.

Yours, etc.,

R. ROE,

Clerk.

To the above-named plaintiff, defendant, primary debtor, garnishee, or other party, as the case may be. (See p. 309.)

198. NOTICE UNDER SECTION 112 (NOW SEC. 117).

(Title of Court and Style of Cause.)

Take notice that the judge has made an order granting leave to the defendant to dispute your claim under section 112 (now 117), and the defendant has given the requisite notice for that purpose. The trial of the cause will take place at the _____ of _____, in the County of _____, on _____, the _____ day of _____, 189____, at the hour of _____ o'clock in the _____ noon.

Yours, etc.,

R..... G.....,

Clerk.

To the plaintiff.

(See p. 206.)

199. CLERK'S NOTICE OF RETURN OF EXECUTION UNDER SECTION 218 (NOW SECTION 225.)

(Title of Court and Style of Cause.)

Take notice that the execution issued on the transcript of judgment in this cause received from the Division Court of the County of _____, on the _____ day of _____, A.D. 189____, was returned *nulla bona* on the _____ day of _____, A.D. 189____.

Dated this _____ day of _____, A.D. 189____.

Yours, etc.,

R. ROE,

Clerk.

To the above-named plaintiff, or defendant, or as the case may be.

200. CLERK'S NOTICE UNDER AMENDED SECTION 87 (NOW SEC. 91).

(Insert title of Court and Style of Cause.)

Take notice that the proceedings in this action having been duly transferred to this court, the same will be placed on the list for trial at the sittings thereof, to be held in the town hall at Castleford, in the County of _____, on _____, the _____ day of _____, A.D. 189____, at the hour of _____ o'clock a.m.

Dated this _____ day of _____, A.D. 189____.

Yours, etc.,

R. ROE,

Clerk.

To the above-named parties and their agents.

(See pp. 147, 149.)

201. CLERK'S NOTICES TO EITHER PARTY.

(Insert title of Court and Style of Cause.)

(Append the following to every notice where the defendant, primary debtor, or garnishee has given notice that he disputes the plaintiff's claim, or has given any other notice of which the plaintiff should be informed, before the trial; or in any case in which it has become the duty of the clerk to give notice to any part of any defence, admission, judge's order, or other matter of which he should be notified before the trial.)

And also take notice that this action will be tried at the sittings of this court, to be held in the town hall in Paris on Tuesday, the day of , A.D. 189 , at the hour of o'clock a.m.

Dated this day of , A.D. 189 .

Yours, etc.,
R. ROE,
Clerk.

To the above-named plaintiff, defendant, primary debtor, garnishee or other party, as the case may be. (See Rules 124, 240.)

202. CLERK'S NOTICE TO PARTIES OF TIME FIXED BY JUDGE FOR DELIVERY OF JUDGMENT, UNDER RULE 161.

(Insert title of Court and Style of Cause.)

Take notice that the judge will give his decision in this cause at the sittings of this court to be holden at in the County of upon the day of , A.D. 18 , at the hour of (or take notice that the decision of the judge in this cause will be delivered in writing at the office of the clerk of this court at in the County of , upon the day of , A.D. 18 , at the hour of), in the noon, and will be then and there read by the clerk to the parties, or their agents, if present.

Dated the day of , A.D. 18 .

Yours, etc.,
R. ROE,
Clerk.

To the above-named parties and their agents.
(See p. 273.)

NOTICES BY PARTIES.

203. NOTICE OF WITHDRAWAL OF DEFENCE.

(Title of Court and Style of Cause.)

Take notice that I withdraw my defence, of which I gave you notice, and consent that judgment be entered against me for the sum of \$.

Yours, etc.,

C..... D.....
Defendant.

To the clerk.
(See p. 296.)

204. NOTICE OF OBJECTION TO JURISDICTION TO TRY COUNTERCLAIM.

(Insert title of Court and Style of Cause.)

Take notice that the plaintiff objects to the court giving any relief upon the counterclaim raised in this action, upon the ground that it involves matter beyond the jurisdiction of this court.

And, further, take notice that the plaintiff will, on the day appointed for the trial of this action, apply to the judge to adjudicate upon the original claim herein.

Dated day of , 189 .

A..... B.....,
Plaintiff.

To the clerk and to the defendant.

(See Rule 114; pp. 112, 113.)

205. DISCONTINUANCE.

(Title of Court and Style of Cause.)

I withdraw this action, as I do not intend to proceed with the same, and I am prepared to pay the defendant's taxable costs (if any) on your notifying the defendant and taking such costs.

Dated this day of , A.D. 18 .

X..... Y.....,
The Plaintiff.

To the clerk of the court and to the defendant.

(See Rule 252; pp. 188, 375, 376.)

206. NOTICE TO CLERK OF CHANGE IN PLAINTIFF'S TITLE BEFORE JUDGMENT.

(Title of Court and Style of Cause.)

I hereby give you notice that A..... B....., the plaintiff (or one of the plaintiffs) in the above action, died upon the day of , A.D. 18 , and that his last will and testament were duly proved by me in the Surrogate Court of the County of (or that letters of administration of his property were duly granted to me) upon the day of , A.D. 18 , and that I am the executor of the said will (or that I am the administrator of the property of the said deceased).

(Or, the above-named A..... B....., by an assignment dated the day of , 18 , duly assigned all his interest in the subject-matter of the above action to me, the undersigned.)

And, further, take notice that I am desirous of being substituted as plaintiff in the above action against the above-named defendant in place of the said A..... B..... (or in addition to the said plaintiff).

Dated this day of , 18 .

[Signature.]

To Mr ,
The Clerk of the said Court.

(See p. 181; Rule 224.)

207. GENERAL HEADING AND CONCLUSION OF ALL NOTICES,
ADMISSIONS, ORDERS, ETC.

No. , A.D. 18 .

In the Division Court, in the County of
Between A..... B....., *Plaintiff*,
and
C..... D....., *Defendant*.

Dated this day of , 18 .

[*Clerk, or person sending notice or
making admission, or signing order.*]

To (the person to whom notice is sent).

208. DEMAND FOR STATEMENT OF NAMES AND PLACES OF RESIDENCE
OF PERSONS CONSTITUTING PLAINTIFF'S FIRM.

(*Title of Court and Style of Cause.*)

SIR,—On behalf of the above-named defendant E..... F....., I require
of you, forthwith, to declare to me, in writing, the names of all persons
who are partners in the firm of A..... B..... & Co., the above-named
plaintiffs, pursuant to the 108th section of The Division Courts Act.

Dated, etc.

Yours, etc.,

M..... N.....,

Solicitor (or agent) for the defendant E..... F.....

To Mr. X..... Y.....,

The plaintiff's solicitor (or agent, or as the case may be).

(See pp. 174, 183.)

209. DECLARATION IN ANSWER THERETO.

(*Title of Court and Style of Cause.*)

SIR,—The names and places of residence of all the persons constitut-
ing the firm of A..... B..... & Co., the above-named plaintiffs, are as
follows:—

A..... B....., who resides at, etc.

G..... H....., who resides at, etc.

L..... M....., who resides at, etc.

Yours, etc.,

X..... Y.....,

Plaintiff's solicitor (or agent).

To Mr. M..... N.....,

Solicitor (or agent) for the defendant E..... F.....

210. NOTICE OF APPLICATION FOR ORDER FOR NAMES OF MEMBERS OF
FIRM.

(*Title of Court and Style of Cause.*)

SIR,—Take notice that a motion will be made on behalf of the above-
named defendant to the judge of this court, at his Chambers in the Court
House, in the City of Hamilton (*or as the case may be*), on the day
of , 18 , at ten o'clock in the forenoon, or so soon thereafter

as the motion can be heard, or an order under the 108th section of The Division Courts Act, directing a statement to be furnished to me of the names of all the persons who are co-partners in the firm of A..... B..... & Co., the above named plaintiffs. That on such application will be read the affidavits of _____, copies of which are thereto annexed.

Dated, etc.

Yours, etc.

M..... N.....,

Solicitor (or agent) for the defendant E..... F.....

To Mr. X..... Y.....,

The plaintiff's solicitor (or agent, as the case may be).

211. FORM OF ORDER FOR STATEMENT OF THE NAMES OF ALL THE PERSONS WHO ARE CO-PARTNERS IN THE PLAINTIFF'S FIRM.

(Title of Court and Style of Cause.)

Upon the application of the above named defendant in this cause, and upon reading the affidavit of service of demand herein, and of (if any other affidavit filed), and upon hearing the parties by their solicitors (or agents;

It is ordered that the above named plaintiffs do, within _____ days of the service of this order, furnish to the defendant, his solicitor or agent, a statement of the names of all the persons who are co-partners in the firm of A..... B..... & Co., the above named plaintiffs.

(Any other terms may be here added.)

Dated, etc.

.....
Judge.

CERTIFICATES AND ORDERS OF CLERK
AND JUDGE.

212. CERTIFICATE UNDER SECTION 45.

{ Seal. }

I, A..... B....., Clerk of the _____ Division Court, in the County of _____, do hereby certify as follows:—

That in the procedure book of the said Division Court the following entries (and no others) appear in a certain cause in the said Division Court wherein one C..... D..... is plaintiff and one E..... F..... is defendant, which said entries are in the words and figures following, that is to say: *(here copy entries verbatim.)*

And I further say that the page of the said procedure book on which said entries are made is signed with the name of _____; and such signature is of the proper handwriting of me, A..... B....., as such clerk (or of G..... H....., the then clerk) of the said court.

Given under my hand and the seal of the said court this _____ day of _____, A.D. 18 _____.

(See p. 35.)

A..... B.....,
Clerk of said Division Court.

213. CLERK'S CERTIFICATE OF PROCEEDINGS TO COURT OF APPEAL
(NOW DIVISIONAL COURT).*(Title of Court and Style of Cause.)*

I, _____, Clerk of the said court, do hereby certify to the Court of Appeal for the Province of Ontario that the annexed papers contain true and examined copies of the summons in this cause, with all notices endorsed thereon, the claim, and any notice or notices of defence and of the evidence and all objections and exceptions thereto, and of all motions or orders made, granted or refused herein ("together with such notes of the judge's charge as have been made, if the cause tried by a jury"), the judgment or decision in writing (or "the notes thereof"), and all affidavits filed or used in the cause, together with all other papers filed in the cause affecting the question raised by the appeal.

Given under my hand and the seal of the said court this _____ day of _____, A.D. 18 .

{ Seal. }

Clerk.

Note.—The appeal is now to a Divisional Court of the High Court of Justice for the Province of Ontario, and this form must be changed accordingly.

(See pp. 292, 302.)

214. CERTIFICATE OF JUDGE AS TO EXCEPTION IN EXEMPTION LAW, WHERE
DEBT IS CONTRACTED PRIOR TO THE FIRST DAY OF OCTOBER, 1887.

I, _____, Judge of the _____ Division Court for the County of _____, do hereby certify, under the provisions of chapter 64 (now Cap. 77), section 7, of the Revised Statutes of Ontario, that this writ of execution is for the recovery of a debt contracted before the first day of October, 1887, as appears by the papers on file herein.

Dated the _____ day of _____, 18 .

(The above certificate to be endorsed on the execution.) _____ Judge.

(See pp. 408, 409.)

215. SUMMONS TO CHANGE THE PLACE OF TRIAL, UNDER SECTION 86
(NOW SECTION 90).*(Insert title of Court and Style of Cause.)*

Upon reading the affidavit of the defendant, and upon hearing him by his solicitor (or agent), let the above-named plaintiff, his solicitor or agent, attend me at my chambers, at _____, on the _____ day after the day of service hereof, at _____ of the clock in the forenoon of the same day, or at such other time and place as chambers may be held, to show cause why the place of trial of this cause should not by order be changed to the sittings of the _____ Division Court for the County of _____, pursuant to the 86th (90th) section of The Division Courts Act; and why such order should not direct the trial of this cause to be had at the next sittings of that court, to be held on the _____ day of _____ next, subject to all the rights of postponement.

Dated at Chambers, this _____ day of _____, A.D. 18 .

Judge.

(Instead of using this form and proceeding by judge's summons, the defendant may apply by serving notice of motion and copy of the affidavit on the plaintiff.)

216. ORDER CHANGING THE PLACE OF TRIAL, UNDER SECTION 86
(NOW SEC. 90).*(Insert title of Court and Style of Cause.)*

Upon reading the affidavit of the defendant herein, and upon hearing the parties by their solicitor (or agent),

I do hereby order that the place of trial of this cause be changed to the sittings of the Division Court of the County of , pursuant to the 86th section of The Division Courts Act; and I further order and direct that the cause shall be tried at the (next) sitting of that court, to be held on the day of next, subject to all rights of postponement.

Dated at Chambers, this day of , A.D. 18 .

.....
Judge.

217. ORDER TO CONTINUE PROCEEDINGS FOR OR AGAINST A NEW PARTY

(Title of Court and Style of Cause.)

Upon hearing C..... L....., who alleged *(state circumstances rendering the order necessary or proper)*,

It is ordered that the proceedings in this action be carried on between *(name the continuing or new parties, as the case may be, whether as plaintiffs or defendants)* and H..... R..... *(the person upon whom the interest has devolved, or to whom an interest has been assigned)*.

Date

(See pp. 174-183.)

.....
Judge.

CHANGE OF PARTIES.

218. ORDER TO PROCEED AFTER THE DEATH OF A PLAINTIFF AFTER
JUDGMENT.*(Title of Court and Style of Cause.)*

Upon reading the affidavit of

It is ordered that E..... Y....., the executor (or administrator of A..... B....., the plaintiff in this action, who has died since judgment herein, be substituted as plaintiff for the original plaintiff, and be at liberty to issue execution against the defendant (or take any such proceedings as the deceased plaintiff was entitled to take against him) for the amount of the unsatisfied judgment and costs [or that the question whether the said E..... Y....., as executor (or administrator) of the original plaintiff, now deceased, is entitled to recover the amount of the judgment obtained against C..... D....., the defendant], shall be tried by action to be commenced by plaintiff in the ordinary way, wherein the said E..... Y..... shall be plaintiff and the said C..... D....., defendant, by such names and descriptions as aforesaid.

Date, etc.

(See Rule 224; p. 181.)

.....
Judge.

219. ORDER TO PROCEED AFTER CHANGE OF INTEREST BY ASSIGNMENT
OR OTHERWISE AFTER JUDGMENT.

(Title of Court and Style of Cause.)

Upon reading the affidavit of

It is ordered that E..... N....., the assignee (or as the case may be) of the judgment obtained by A..... B....., the plaintiff (or C..... D....., the defendant, as the case may be), in this action, be substituted as plaintiff (or defendant) in the name by the description of E..... N....., of, etc., the assignee of A..... B....., the plaintiff (or C..... D....., the defendant) herein, and that he in and by such name and description be at liberty to issue execution.

(Conclude as in preceding form 218.)

NOTE.—No proceedings under a judgment or order, either by judgment summons or otherwise, can be taken after any change of interest in the parties entitled to the benefit of the judgment or order without an order in one of the foregoing forms.

(See Rule 140; pp. 114, 181, 391, 392.)

220. RETURN BY JUDGE TO CERTIORARI.

In the High Court of Justice, Queen's Bench Division (or as the case may be.)

The answer of me, A..... B....., Judge of the County Court of the County of, who, by virtue of this writ, to me directed and delivered, do, under my hand and seal, certify unto Her Majesty, in her High Court of Justice for Ontario, at Toronto, the (here describe what the writ calls for), of which mention is made in the same writ. The return to this writ further appears by a certain schedule annexed thereto.

In witness whereof, I, the said A..... B....., have to this affixed my hand and seal this, day of, 18

A..... B..... [L.S.]

(The following schedule will be annexed to the certiorari:—)

SCHEDULE.

Referred to in the return to the annexed writ of certiorari indorsed thereon.

(Here give in regular order the papers in the suit returned with the certiorari, and annex the original papers to the schedule.)

A..... B.....,

Judge of the County Court of the County of

(See p. 130.)

221. LIST OF UNCLAIMED MONEYS VERIFIED.

For whom or on whose account money paid.	When paid.	Style and No. of Suit.	Amount. \$ cts.

Sworn, etc.

(See pp. 40, 498; Rule 178.)

FORMS—PAY LIST OF JURORS, CROSS JUDGMENTS. 671

222. PAY LIST OF JURORS.

Summoned to attend at a sitting of the Division Court of the County of _____ on the _____ day of _____, A.D. 18____, and judge's certificate to county treasurer.

No. on list.	Names of Jurors.	Date of Service.	Attendance.		Amount paid each Juror.		Signature of Juror acknowledging receipt of money.
			First day.	Second day.	\$	c.	
1							
2							
3							
4							
5							
6							
7							
8							
9							
10							
11							
12							
Total amount paid by Clerk..... \$							

I, _____, presiding judge of the above-mentioned court, do hereby, in pursuance of the 172nd section of the Division Courts Act, certify to the treasurer of the said County of _____ that the above is a true statement of the amount paid by the clerk of the said court to each of the jurors mentioned in the above list, who were summoned and attended said sittings, and neither of whom so attended as a witness in any cause or as a litigant in his own behalf, amounting in the whole to \$ _____.

Dated this _____ day of _____, 18____.

(See pp. 309, 319.)

_____,
Judge.

CROSS JUDGMENTS.

223. NOTICE OF APPLICATION, UNDER SECTION 213 (NOW SECTION 219), FOR JUDGE'S ORDER FOR CROSS JUDGMENT TO BE SET OFF.

(Insert title of Court and Style of Cause.)

Take notice that application will be made to the judge on the _____ day of _____, 18____, at his chambers in _____, at the hour of _____ o'clock a.m., for an order directing that the cross-judgments which have been entered between the parties in these causes be set off, the one against the other, and that satisfaction of the judgments so set off be entered by the clerk in the procedure book, as directed by the 213th section of the Act.

Dated, etc.

Yours, etc.,

This notice to be served by the party making the application.
(See Rule 144, pp. 36, 385.)

672 FORMS—CROSS JUDGMENTS, SATISFACTION PIECE.

224. JUDGE'S ORDER, UNDER SECTION 213 (NOW 219).

(Insert title of Court and Style of both Causes).

Upon reading the notice served upon the defendant (*or* plaintiff) in this cause and the affidavit of service thereof, and upon the application of _____, the plaintiff (*or* defendant), in the first cause above-named, and the defendant (*or* plaintiff), in the second cause above-named (*or as the case may be*), and no cause appearing to the contrary, I do order that the cross-judgment between the parties in these causes be set off, the one against the other, and that _____, who has obtained judgment for the larger sum, shall have execution only for the balance over the smaller judgment, and that the clerk do make in the procedure book in both the said causes an entry of this order, and also enter a satisfaction on the judgment for the smaller sum; but if both sums are equal, that he do enter in the procedure book satisfaction of both judgments, and that execution thereon be stayed.

Dated, etc. _____,

(See p. 385.)

Judge.

Form

225. ENTRY OF SATISFACTION OF SMALLER JUDGMENT, UNDER SECTION 213 (NOW 219).

Satisfaction is entered under section 213 (219) in this action, by setting off judgment between the same parties in suit No. _____, 18____, by judge's order.

(See p. 385.)

Form

226. ENTRY OF PARTIAL SATISFACTION ON LARGER JUDGMENT, UNDER SECTION 213 (NOW 219).

Satisfaction is entered for \$ _____, part of the amount adjudged to the plaintiff (*or* defendant) by judge's order under section 213, by setting off the amount adjudged against him in favor of the plaintiff (*or* defendant) in suit between them numbered _____, 18____, and it is further ordered that the plaintiff (*or* defendant) do have execution only for \$ _____, the balance over the said judgment.

(See p. 385.)

227. REQUEST OF CREDITOR FOR DISCHARGE OF DEBTOR ARRESTED ON WARRANT OF COMMITMENT.

(Insert title of Court and Style of Cause.)

I, the undersigned A..... B....., the plaintiff (*or* the beneficial plaintiff) in this action, request that the defendant, if still in custody, may be discharged (*or*, if not in custody, that he be not arrested.)

A..... B.....

To the clerk or to the bailiff of the said court.

(See Rule 206; p. 435.)

FORMS—DISCHARGE FROM CUSTODY, CONFESSION. 673

228. CERTIFICATE FOR DISCHARGE OF A PARTY FROM CUSTODY.
No. , A.D. 18 .

(Insert title of Court and Style of Cause.)

I, X..... Y....., certify that the defendant, now in your custody under warrant of commitment in this cause, has, since the issuing of the said warrant, satisfied the moneys for the non-payment whereof he was so committed, together with all costs and charges in respect thereof; and the said defendant may, in respect of such warrant, be forthwith discharged from and out of your custody.

Given under the seal of the court this day of , A.D. 189 .

{ Seal. }

X..... Y.....
Clerk.

To the gaoler of the common gaol of the County of
(See p. 435.)

229. CONFESSION OF DEBT, AFTER SUIT COMMENCED.

In the Division Court, in the County of
Between A.....B....., *Plaintiff*,
and
C.....D....., *Defendant*.

I acknowledge that I am indebted to the plaintiff in the sum of and consent that judgment for that amount and costs may be entered against me in this cause, according to the practice of the court.

Dated the day of , 18 .

Witness: C..... D.....
Clerk (or Bailiff.) (See pp. 189, 206, 371.)

230. ADMISSION OF CLAIM OR PART OF CLAIM, UNDER SECTION 113 (NOW 118) OF THE ACT.

(Title of Court and Style of Cause.)

I, the defendant, having filed a notice of defence in this action, withdraw such defence and consent that judgment be entered against me, and I do hereby confess and admit that the sum of \$, the amount claimed (or the sum of \$, being part of the amount claimed by the plaintiff in this action), is due to him from me (and that I will pay the same by instalments of \$).

Dated this day of , 189 .

Signed in the presence of }

(This paper marked "A" is the statement referred to in the annexed affidavit.)

(See p. 206.)

231. AFFIDAVIT OF SIGNATURE TO ADMISSION.

(Insert title of Court and Style of Cause.)

I, _____, of _____, Gentleman, make oath and say:—That I was present on the _____ day of _____, A.D. 189____, and did see the above-named defendant sign the statement hereunto annexed, marked with the letter "A," and that the name set to the said statement is in the handwriting of the defendant, and that the name set to the said statement as the witness attesting the same is in my handwriting.

(Conclude as in other affidavit form.)

BAILIFF'S FORMS.

232. APPRAISER'S OATH ON ATTACHMENT CASES.

You, and each of you, shall well and truly appraise the property and effects mentioned in this inventory *(holding it in his hand)* according to the best of your judgment. *So help you God.*

(See pp. 462, 468.)

233. APPRAISEMENT TO BE INDORSED ON INVENTORY.

We, B..... B..... and B..... D....., having been duly sworn by the bailiff, V..... W....., to appraise the property and effects mentioned in the within inventory, to the best of our judgment, and having examined the same, do appraise the same at the sum of \$

Witness our hands this _____ day of _____, A.D. 18____. B..... B.....
B..... D.....

(See pp. 462, 468.)

234. NOTICE OF SALE.

By virtue of an execution issued out of the _____ Division Court for the County of _____, and to me directed, against the goods and chattels of _____, at the suit of _____, I have seized and taken in execution one bay horse, etc.

All which property will be sold by public auction, at _____, on the _____ day of _____, 18____, at the hour of _____ o'clock in the _____ noon.

Dated _____ day of _____, 18____.

V..... W.....,
Bailiff.

(See p. 415.)

RETURNS TO EXECUTIONS, ETC.

235. *Nulla Bona*.—The within defendant (*or* plaintiff) hath no goods or chattels in the said County of _____ whereof I can make the moneys to be levied, or any part thereof, as within commanded.

Dated _____ day of _____, A.D. 18 ____.

(See pp. 382, 395, 417; Rule 185.)

V..... W.....,
Bailiff.

236. *Feci*.—By virtue of the within execution, I have made of the goods and chattels of the defendant (*or* plaintiff) the moneys within mentioned, and have paid the same to the said clerk as within commanded.

Dated _____ day of _____, A.D. 18 ____.

(See pp. 417, 418.)

V..... W.....,
Bailiff.

237. *Any part made*.—By virtue of the within execution, I have made of the goods and chattels of the defendant (*or* plaintiff) \$ _____, and have paid the same to the said clerk, and the defendant (*or* plaintiff) hath no more goods or chattels in the said County of _____ whereof I can make the residue of the said moneys, or part thereof.

Dated _____ day of _____, A.D. 18 ____.

V..... W.....,
Bailiff.

238. WHEN RENT LEVIED BY BAILIFF.

By virtue of the within execution, I have made of the goods and chattels of the plaintiff (*or* defendant) \$ _____, part whereof, \$ _____, I have paid to O..... B....., landlord of said plaintiff (*or* defendant) for one quarter's rent in respect of premises when levy made; and a further part, \$ _____, I have retained as fees on execution. The residue, \$ _____, I have paid to the said clerk as within commanded.

Dated _____ day of _____, A.D. 18 ____.

(See section 278 and notes thereto.)

V..... W.....,
Bailiff.

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W.....,
Bailiff.

239. FORM OF BAILIFF'S RETURN.

B.—This form is to be used in making returns under the 193d General Rule, which rule is to be read and understood in connection with the provisions of The Division Courts Act, touching the execution and return of Writs of Executions, and with rule 194. As the return is made and sworn to every Court day, the dates are to be filled in as noted, viz.:—
 (a) The day next before the last Court day; (b) the day on which return made; and note further—(c) when process is other than a Writ of *Fieri Facias*, it should be so noted; (d) in this column is to be set down the particular return made, with any other information necessary to show the due and faithful discharge of duty by the Bailiff in respect to each cash case.

RETURN OF V..... W....., Bailiff of the Division Court, in the County of, made in pursuance of the Rules of Practice touching all Warrants, Precepts, and Writs of Execution, acted on or in hand, between the (a) day of, A.D. 18, and the (b) day of, A.D. 18

Numbers.	Style of Cause.	When Writ of <i>Fieri Facias</i> received. (c)	Amount to be levied.	Amount levied.	When levied.	Amount of Bailiff's charges.	Amount paid to Clerk.	When paid.	Remarks.
		A.D. 189 .	\$ c.	\$ c.	A.D. 189 .	\$ c.	\$ c.	A.D. 189 .	

I, V..... W....., above named, make oath and say:—That the foregoing return is full, true, and correct in every particular. Sworn before me at, in the County of, A.D. 18

X..... Y....., Clerk. V..... W....., Bailiff.
 N.B.—The foregoing return will serve as a guide for the form and mode of ruling "The Bailiff's Process Book."
 (See p. 44.)

APPEALS.

DITCHES AND WATERCOURSES.

The forms Nos. 240-243 relating to appeals under The Ditches and Watercourses Act are now unnecessary: see notes, *ante*, p. 253.

APPEALS UNDER THE LINE FENCES ACT.

(See Rules 320-329, *ante*, pp. 560, 561.)

244. NOTICE OF APPEAL.

To A..... B....., C..... D....., and E..... F....., three fence-viewers of the Township of , in the County of , and G..... H....., of the same place.

Take notice that I, J..... K....., of the of , in the County of , being the person affected by the said award hereinafter mentioned, and being dissatisfied with the said award, do intend to prosecute an appeal to the County Judge of the County of against an award made under The Line Fences Act by the said A..... B....., C..... D....., and E..... F....., three fence-viewers as aforesaid (or as the case may be), dated the day of , 18 , whereby I, the said J..... K..... (here set out the award, or such portion of it as is complained of).

And, further, take notice that the cause and matter of my appeal are:—
First (here set out in detail all the grounds of complaint against the said award.)

Dated this day of , 18 .

J..... K.....

245. ORDER BY JUDGE FOR DEPOSIT BY APPELLANT AND FOR TRIAL OF APPEAL UNDER THE LINE FENCES ACT.

In the matter of the appeal by J..... K..... against the award of A..... B....., C..... D..... and E..... F....., three fence-viewers of the Township of , in the County of

I hereby order and direct that the said appellant, C..... D....., do, within six days, deposit with the clerk of the Division Court of the County of the sum of \$ (or such sum as may be ordered), as an indemnity against the costs of the said appeal.

And upon such deposit being so made, I order that the said appeal be tried at the sittings of the said court, to be held at the Court Room, in the of , in the said county, on the day of , 18 , at the hour of o'clock in the noon.

Dated this day of , 18 .

V..... W.....,
County Judge.

To J..... K.....,
The above appellants; and

To X..... Y.....,
The Clerk of the said court.

NOTE.—Where the judge does not direct the deposit to meet costs the form will be varied.

day of
 , A.D. 18
 N.B.—The foregoing return will serve as a guide for the form and mode of ruling "The Bailiff's Process Book."
 (See p. 44.)
 V..... W....., Bailiff.
 X..... Y....., Clerk.

678 FORMS—APPEALS UNDER MASTER AND SERVANT ACT.

246. JUDGMENT BY COUNTY JUDGE ON APPEAL UNDER THE LINE FENCES ACT.

In the Division Court, in the County of
In the matter of appeal by J..... K..... against the award of A.....
B....., C..... D....., and E..... F....., three fence-viewers of the Town-
ship of , in the County of , under The Line Fences Act.
The said appeal having come on for hearing before me this day
of , 18 , at the sittings of the Division Court, for the
County of (or as the case may be), in the presence of the said
J..... K....., and all the parties interested (name the other parties if
judgment affects them, and if any of them are not present state their absence),
after hearing what was alleged by the said J..... K....., and by the other
parties affected by the said award, I do order and adjudge that the said
award be and the same is hereby affirmed (or insert after the word award,
"be set aside," or "be altered and amended as follows":—) (here set out
the particular alterations).

And I direct that the same be certified by the clerk of this court to the
clerk of the said municipality.

And I tax and fix the costs of this appeal at \$, including
\$, my expenses herein, which said costs I order to be paid by
the said J..... K..... (or "to be paid and apportioned as follows":—)
(here state by whom and in what proportions the costs are to be paid). The
said sum of \$, being my said expenses, to be paid in the first
instance by the said municipality.
(Statute of 1890, c. 67.)

Dated this day of , 18 .

V.....W.....,
County Judge.

FORMS FOR APPEALS UNDER MASTER AND SERVANT ACT
AND TAX ON DOGS ACT.

247. NOTICE OF APPEAL UNDER MASTER AND SERVANT ACT, R.S.O.,
CAP. 157.

To A..... B....., of, etc., (the name and addition of the party to whom
the notice of appeal is required to be given).

Take notice, that I, the undersigned C..... D....., of, etc., being the
person aggrieved by the order hereinafter mentioned, do intend to enter
and prosecute an appeal at the (next) sittings of the Division
Court for the County of , to be holden at , on the
day of next (or "instead"), against a certain order made by
L..... M....., Esq., one of Her Majesty's Justices of the Peace in and
for the (said) County of (or Police Magistrate in and for the City
(or Town) of), whereby I, the said A..... B....., was ordered to
pay (here state the terms of the order made as fully and correctly as
possible).

And, further, take notice that the cause and matter of my appeal are,
first, that [I never was indebted to the said A..... B..... for the said
amount of wages so ordered to be paid by me; secondly, that before the
proceedings were taken upon which the said order was made, I paid the
said A..... B..... the wages in said order mentioned, together with any
other cause or matter of appeal, care being taken that all grounds of appeal
relied on are stated, as the appellant will be precluded from going into any
other than those stated].

Dated this day of , A.D. 18 .

A..... B.....

NOTE.—The above form may be varied to suit the case where the
appeal is against an order of dismissal or other decision of the justice.

FORMS—APPEALS UNDER MASTER AND SERVANT ACT. 679

248. APPEAL BOND OR APPEAL AGAINST AN ORDER FOR PAYMENT OF WAGES UNDER MASTER AND SERVANT ACT, R.S.O., CAP. 157.

Know all men by these presents, that we, C..... D....., of, etc., and E..... F....., of, etc., and G..... H....., of, etc., are jointly and severally held and firmly bound to A..... B....., of, etc., in the final sum of one hundred dollars of lawful money of Canada, to be paid to the said A..... B....., or his certain attorney, executors, administrators, or assigns, for which payment, well and faithfully to be made, we bind ourselves, and each and every of us in the whole, our and each and every of our heirs, executors, and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this day of, in the year of our Lord, one thousand eight hundred and

Whereas the said A..... B....., on the day of, instant (or "last past"), made complaint against the said C..... D....., before L..... M....., one of Her Majesty's Justices of the Peace in and for the County of (or the Police Magistrate in and for the City (or Town) of), for the alleged non-payment of wages by the said C..... D..... to the said A..... B......

And whereas the said C..... D..... was, on the day of, instant (or "last past"), by the said L..... M....., or such justice as aforesaid (or "as such police magistrate"), ordered to pay to the said A..... B..... the sum of (here fully and particularly state the substance of the order).

And whereas the said C..... D....., being dissatisfied with the decision of said complaint, and with the said order made thereon, is desirous of appealing against the same to the Division Court for the (said) County of, at its (next) sitting, to be held on the day of next (or instant), and, in pursuance of the statute in that behalf, this bond is given as security to such appeal.

And whereas the above bounden E..... F..... and G..... H....., at the request of the said C..... D....., have agreed to enter into the above-written obligation, for the purposes aforesaid.

Now, therefore, the condition of this obligation is such, that if the above bounden C..... D..... shall personally appear at the said court and try such appeal, and abide the judgment of the court thereon, and pay such costs as shall be by the said court awarded, then that this obligation shall be void; otherwise the same shall remain in full force and effect.

Signed, sealed, and delivered
by the above bounden
C..... D....., E..... F.....,
and G..... H....., in the
presence of J..... K.....

C..... D..... { Seal. }

E..... F..... { Seal. }

G..... H..... { Seal. }

(The above form can be altered to suit the circumstances of any particular case.)

249. APPROVAL OF APPEAL BOND BY THE CLERK, TO BE ENDORSED ON BOND.

I approve of the within bond and of the sufficiency of the sureties therein named.

Dated this day of , 18 .

X..... Y.....,
Clerk.

(When required by the clerk, affidavit of justification must be made, and Form 35 for affidavit of execution of the bond.

250. DEMAND OF JURY, UNDER MASTER AND SERVANT ACT AND TAX ON DOGS ACT.

In the Division Court, in the County of

A..... B....., *Appellant*,

v.

C..... D....., *Respondent*.

Take notice that I hereby require a jury to be summoned in this appeal.

Dated this day of , A.D. 18 .

A..... B.....,
Appellant.
or C..... D.....,
Respondent.

To the Clerk of this Court.

THE INDUSTRIAL SCHOOLS ACT.

251. SUMMONS FOR MAINTENANCE.

(Title of Court and Style of Cause.)

You, the above-named defendant, are hereby summoned to appear at
in the County of on the day of , A.D.
18 , at the hour of o'clock in the forenoon, to answer the allegation of the plaintiff that you, the same defendant, are liable for the expense of maintaining one E..... D....., a boy detained in the Industrial School under the charge of the above-named plaintiffs in the Village of Mimico, in the County of York, a copy of which is hereunto annexed.

And, further, you are hereby required to take notice that the plaintiffs claim that you are able to pay the sum of \$ per week towards the said expenses, and that if you do not appear at the said time and place such order will be made in your absence as may seem just.

Given under the seal of the court and dated this day of
A.D. 18 .

R..... R....., *Clerk*.

252. ORDER OF PARENT, STEP-PARENT, OR GUARDIAN FOR THE PAYMENT OF WEEKLY SUM FOR MAINTENANCE OF CHILD.

On the complaint of the Victoria Industrial School Association of the City of Toronto (or of the School Corporation or Philanthropic Society—mentioning its corporate name), or of A..... B....., the agent of the (here name the corporation or society of which he is agent), the defendant having been summoned to appear at a sittings of the said court on the day of 18 , at in the said County , to answer the said complaint and the allegation that the defendant is liable for the expense of maintaining one C..... D....., a boy detained in the said Industrial School (or name the society) under the charge of the plaintiffs in the Village of Mimico, in the County of York, and it being found that the defendant is able to pay the sum of \$ per week towards the said expenses, it is therefore adjudged and ordered that the defendant do pay the plaintiffs the sum of weekly, as follows, viz.: (here state the time and manner of such payments).

253. FORM OF COMPLAINT.

(Title of Court and Style of Cause.)

The plaintiff alleges that E..... D..... is a child, who is and has been detained in the certified Industrial School under the charge of the plaintiffs for weeks, in the Village of Mimico, in the County of York, the defendant is the parent (or guardian, or step parent, of the said E..... D.....) and is liable for the expense of maintaining the said child, and they claim that the defendant is able to pay the sum of \$ per week towards the said expense, and does not pay the same, but refuses to do so, and hereby apply for an order in that behalf.

Sealed with the seal of the corporation this day of , A.D. 18 .

R. L. N.,
President or Agent or Secretary or Treasurer
of the said Corporation.



ADDITIONAL DIVISION COURT FORMS.

254. PARTICULARS OF PLAINTIFF'S CLAIMS.

(Where the proceeding is by ordinary summons.)

(1) A..... B....., of, claims from C..... D....., of, \$60 for damages* for breach of a contract to employ the said A..... B..... as a traveller, which contract may be briefly stated as follows: (*here state the contract.*)

Or, (2) *For wrongful dismissal from the defendant's employment as traveller (and \$..... for arrears of wages.)

Or, (3) * For the defendant's wrongfully quitting the plaintiff's employment as manager.

Or, (4) * For breach of duty as factor (*Or as the case may be*) of the plaintiff, and \$..... for money received as factor (*or as the case may be.*)

Or, (5) * For breach of the terms of a deed of apprenticeship of X..... Y..... to the defendant (*or plaintiff*).

Or, (6) * For non-compliance of the written award of X..... Y....., bearing date the day of, 189..... (*here state the matter of non-compliance complained of*).

Or, (7) * For negligence in the custody of goods (and for wrongfully detaining the same).

Or, (8) * For negligence in the keeping of goods pawned (and for wrongfully detaining the same).

Or, (9) * For negligence in the custody of furniture let on hire (*or a carriage loaned*).

Or, (10) * For wrongfully neglecting (*or refusing*) to pay the plaintiff's cheque.

Or, (11) * For breach of contract to accept the plaintiff's draft.

Or, (12) * Upon a bond conditioned not to carry on the trade of a

Or, (13) * For refusing to carry the plaintiff's goods by railway.

Or, (14) * For refusing to carry the plaintiff by railway.

Or, (15) * For breach of duty in and about the carriage and delivery of coals by railway.

Or, (16) * For breach of duty in and about the carriage and delivery of machinery by sea.

Or, (17) * For wrongfully depriving plaintiff of goods—household furniture, etc.

Or, (18) * For improperly distraining plaintiff's goods.

Or, (19) * For fraudulent misrepresentation on the sale of a horse (*or a business, or shares, or etc.*).

Or, (20) * For fraudulent misrepresentation of the credit of A..... B.....

Or, (21) * For breach of a contract of guarantee for A..... B.....

Or, (22) * For breach of a contract to indemnify the plaintiff as the defendant's agent to distrain.

Or, (23) * For breach of a contract to keep a house in repair.

Or, (24) * For breaches of covenants contained in the lease of a farm.

Or, (25) * For injury by the defendant's dog.

Or, (26) * For injury to the plaintiff (*or, if by husband and wife, to the plaintiff, C..... D.....*) by the negligent driving of the defendant or his servants.

Or, (27) * For injury to the plaintiff at the defendant's railway station, from the defective condition of the station.

Or, (28) * For breach of contract to accept and pay for goods.

*Or, (29) * For non-delivery (or short delivery, or defective quality, or other breach of contract of sale) of cotton, etc.*

*Or, (30) * For breach of warranty of a horse.*

*Or, (31) * For breach of contract to let (or take) a house.*

*Or, (32) * For wrongfully entering plaintiff's land and drawing water from his well (or cutting his grass, or cutting down his timber, or pulling down his fences, or removing his gate, or using his road or path, or crossing his field, or depositing sand there, or carrying away gravel from thence, or carrying away stones from his river).*

*Or, (33) * For wrongfully diverting (or obstructing, or polluting, or diverting water from) a watercourse.*

*Or, (34) * For wrongfully discharging water upon the plaintiff's land (or into the plaintiff's mine).*

*Or, (35) * For wrongfully obstructing the plaintiff's use of a well.*

*Or, (36) * For loss of the plaintiff's goods in the defendant's inn.*

*Or, (37) * For that the said C..... D..... detained from the said A..... B..... his goods and chattels; that is to say, a horse named "Bob Foster," also a harness and sulky. The said A..... B..... claims a return of the same, or their value, and \$60 for their detention.*

(Any of the foregoing forms of particulars of causes of action may be used as forms for counterclaim, reserving the names of parties.

255. PARTICULARS OF PLAINTIFF'S DEMAND FOR NUISANCE AND INJUNCTION.

(Commence as in particulars of other actions and proceed thus:—)

For damages suffered by him at his dwelling house, number 6 Essex Street, in the City of Guelph, from offensive and pestilential smells and vapors caused by the defendant, \$60.

256. MEMO. TO BE ENDORSED ON GARNISHEE SUMMONS UNDER SECTION 182 (2), WHEN PRIMARY DEBTOR IS UNMARRIED AND HAS NO FAMILY DEPENDENT UPON HIM FOR SUPPORT.

The said primary debtor is an unmarried person, having no family depending on him for support.

A..... B.....,
Solicitor for Primary Creditor.

(Section 104, Rule 20, ante p. 163.)

258. AFFIDAVIT FOR ORDER FOR SUBSTITUTIONAL SERVICE.

(Commence as in form 22.)

I, E..... F....., of the of in the County of
Bailliff of the above-mentioned court (or as the case may be), make oath and say:

1. That on or about the day of last past (or instant), I received from the clerk of this court the annexed summons and particulars of claim thereto attached for service on the above-named defendant.

2. That, in accordance with my duty in that respect, I did, on the day of instant (or last past), attend at his place of residence, at the of and, on enquiring there for the said defendant, was informed by a person at and in the said place of residence, who represented herself to be, and whom I believe to have been, the wife (or as the case may be; and if the name of the other person is known it had better be stated) of the said defendant, that the said defendant was not at

home (*here state the answer given*), and I then stated to the said person the nature of my business, and told her (*or him*) that I called to serve the defendant with the said summons and claim, and that I would call again for that purpose, at the said place of residence, on the day of , then next, at or about of the clock, in the noon.

(Here state what calls and other attempts were made to effect service, what, if anything, was done, and what the wife or other members of the family said in reply to the questions asked about the defendant: the affidavit should here state when he absconded, and where he has gone to, if that can be ascertained, and his post office address there, and for what purpose or with what object he went away. The post office address of the defendant while he lived in Ontario should also be given, and generally such facts and circumstances should be shown as to make a judge believe that all reasonable efforts had been made to effect personal service, and that either the summons had come to knowledge of defendant or that he wilfully evaded service of the same, or had absconded.)

3. That I have used all the due means in my power to serve the said defendant personally with a true copy of the said summons and claim, but have not been able to do so; and, for the reason aforesaid, I verily believe that the said summons has come to the knowledge of the defendant (*or that he wilfully evades the service of the same, or that he has absconded to (naming the place particularly, if possible, to which he went, and when).*

Sworn, etc.

(The affidavit should state that the calls have been made at the defendant's place of residence, unless the defendant has no known place of residence, and that reasonable efforts had been made to ascertain it (*Chitty's Forms*, 13th ed., 75-79). What the officer said (*Dubois v. Lowther*, 4 C.B. 228) and the answers to his enquiries (*Fisher v. Goodwin*, 2 C. & J. 94) should be distinctly stated in the affidavit.)

(Section 116, *ante* p. 195.)

259. AFFIDAVIT FOR IMMEDIATE JUDGMENT.

(Commence as in form 22.)

1. That I am the above-named plaintiff (*or one of the above-named plaintiffs*) in this cause; (*or*, That I am the agent (*or* accountant) of the above-named plaintiff and have personal knowledge of the matters herein).

2. The above-named defendant is justly and truly indebted to me (*or to the plaintiff*) in the sum of \$ in respect of the matters stated in the particulars of claim hereunto annexed.

3. In my belief there is no defence to this action.

Sworn, etc. (*form 22.*)

(Section 117, *ante* p. 205.)

260. AFFIDAVIT TO SET ASIDE JUDGMENT AND BE ALLOWED TO DEFEND ON THE MERITS.

(Commence as in form 22.)

I, , of the of , in the County of , and Province of Ontario (*addition*), make oath and say:—

1. That I am the (*or one of the*) above-named defendant in this cause. (*If made by a solicitor or agent it may be in this form:—That I am the solicitor (or duly authorized agent) of the above-named defendant in this cause, and, when not otherwise herein expressed, that I have a personal knowledge of the matters herein deposed to).*

2. That the summons herein was served on me (or the above-named defendant, as I am informed and believe) on or about the day of , last past.

3. That notice disputing the plaintiff's claim (or of the Statute of Limitations, etc., as the case may be as mentioned in General Rule 20) was intended to be given herein, but (here set out particularly the reason why such notice was not given in time, and accounting for the delay).

4. That I have (or the said defendant has) a good defence to this action on the merits, as I am advised and verily believe (or if made by a solicitor or agent:—As I am instructed and verily believe), and such defence consists in this:—(here particularly show one or more of the grounds of defence relied on, so that the judge may see that there is something to be tried should the application be granted).

5. That the application to be made herein is not for the purpose of delaying the plaintiff in the recovery of judgment and execution against me (or the said defendant) in this cause, but solely for the purpose of my (or the above-named defendant) being allowed in to dispute the plaintiff's claim, and to defend this action on the merits aforesaid.

Sworn, etc. (See pp. 201, 206.)

261. AFFIDAVIT OF JUSTIFICATION OF SURETIES TO CLERK'S OR BAILIFF'S COVENANT.

County of } We, , of the , of , in the
To wit: } County of , and , of the , of
in the County of , within named, severally make oath and say:—

1. And first, I, this deponent (naming him), for myself, say, that I am a freeholder and resident within the County of

2. That I am one of the sureties mentioned in the annexed covenant, for the due performance by (name of the Clerk) of the duties of the office of clerk of the Division Court for the County of

3. That I reside at , in the said , and am worth real property to the amount of , dollars over and above all encumbrances, and over and above what will pay all my just debts, and every other sum for which I am now bail, or for which I am surety.

4. That I am not surety for any person except for the said

5. And I, the said (naming him), for myself, say, that I am a freeholder and resident within the County of

6. That I am one of the sureties in the annexed covenant, for the due performance by (name of the Clerk) of the duties of the office of clerk of the Division Court for the County of

7. That I reside at , and am worth real property to the amount of , dollars over and above all encumbrances, and over and above what will pay all my just debts, and every other sum for which I am now bail, or for which I am surety.

8. That I am not surety for any public officer except for the said

The above-named deponents
(naming them) were severally sworn before me at
, in the County of
, this day of
, A.D. 18 .

A Commissioner for taking affidavits in and for the County of

(Section 112 (4), *ante* p. 174.)

262. AFFIDAVIT OF SERVICE OF SUMMONS ON PARTNERSHIP FIRM.

(Commence as in form 22.)

That I did on the day of , A.D. 18 , duly serve the above-named partnership firm, the defendants in this cause, with, etc. (as in form 28, according to the nature of the summons), by delivering the same personally (or as the case may be) to K..... L....., who then was a partner in the said firm.

(Then proceed to the close as in ordinary affidavits of service.)

(Section 143, *ante* p. 259.)

263. AFFIDAVIT FOR ORDER TO EXAMINE A SICK, AGED, OR INFIRM WITNESS.

(Commence as in form 22.)

1. This action is brought for (*here state concisely the cause of action sued for*).

2. The summons herein was served on or about the day of , A.D. 18 , and this action can be heard at the sittings of the court which will be held on the day of next (*or instant*).

3. The defendant has (*or, if he makes the affidavit, I have*) filed a notice disputing the plaintiff's claim herein.

4. That E..... F....., of, etc. (*a person residing within the province*), is a material and necessary witness on my behalf, as I am advised and verily believe, and I cannot safely proceed to the trial hereof without his evidence, and that the materiality of his evidence consists in this (*here in a general way describe it*).

5. That said E..... F..... is sick, being dangerously ill with (*here describe disease*) and not expected to recover (*or as the case may be, or that he is aged, or infirm, being now years of age, or that he is about to leave the province, as the case may be*), and that his attendance at court as a witness cannot by reason thereof be procured.

6. I am advised and believe that I have a good cause of action (*or defence*) herein on the merits, and that this application is made *bona fide* and not for the purpose of delay.

Sworn, etc. (*form 22*).

(The affidavit should clearly show that the person proposed to be examined is weak, aged, or infirm, or about to leave the province, and that his attendance at court as a witness cannot, by reason thereof, be procured. If possible, this should not be left to a general statement merely, but facts and circumstances should be given. If founded on sickness of the witness, an affidavit by or a verified certificate of the medical attendant should form part of the application, the former being preferable. The affidavit had better be made by the applicant, his solicitor, or agent. As a general rule, the materiality of the proposed evidence need not be given as appears in the 4th paragraph; but if the application is likely to be opposed, or there is anything exceptional in the circumstances, it had better be stated with particularity.)

(Section 141, *ante* p. 254.)

264. AFFIDAVIT FOR COMMISSION TO EXAMINE WITNESSES.

(Commence as in form 22.)

1. That this action is brought for the recovery of (*here state shortly the cause of action*).

2. That the defendant has filed a disputing notice herein.

3. That E..... F..... is a material and necessary witness for me in the said cause, and I am advised, and verily believe, that I cannot safely proceed to the trial of it without his evidence.

4. That the said E..... F..... is at present residing at _____, without the limits of the Province of Ontario. (*If made by the defendant, add the following:—*5. That I have a good defence to this action on the merits, as I am advised, and verily believe (*or, if made by a solicitor or his clerk, say:—The defendant has, as I am instructed, and verily believe, a good defence, etc.*).6. This application for a commission is made *bona fide* for the purpose of procuring the evidence of the said _____, and not for delay.Sworn, etc. (*form 22*). _____

265. AFFIDAVIT OF JUSTIFICATION BY SURETIES TO APPEAL BOND ON APPEAL FROM DIVISION COURT.

Unnecessary owing to change in practice: see notes, *ante* p. 299.

(See p. 387.)

266. AFFIDAVIT AFTER TRANSCRIPT HAS BEEN ISSUED UNDER SECTION 223.

(Style of Court and Cause.)

(Commencement as in other affidavits.)

1. That I have a personal knowledge of the facts connected with judgment rendered in this cause.

2. That the said judgment remains unsatisfied in the whole (*or in part, as the case may be, showing how much remains unpaid*).That the execution issued in the _____ Division Court, of the County of _____, to which a transcript was issued from this court has been returned *nulla bona* (*or I believe the defendant has not sufficient goods in that division to satisfy the said judgment*).(*Add final conclusions as in other affidavits, forms _____.*)

(See Section 200.)

267. AFFIDAVIT FOR ORDER TO DISCHARGE PORTION OF DEBT FROM CLAIM OF PRIMARY CREDITOR.

(Commence as in form 44.)

1. I am the _____, and have a full knowledge of the accounts between the primary debtor and the garnishees.

2. That on the _____ day of _____, A.D. 18 _____, the garnishees were indebted to the primary debtor in the sum of \$ _____.

3. That the garnishee summons herein, I am advised and believe, was served on the garnishees on the _____ day of _____, A.D. 18 _____.

4. That hereafter the garnishees filed through their solicitors with the clerk of this court, as I am advised and believe, an admission that they had in hand a sufficient sum to pay the amount of the primary creditor's claim and costs herein, and they consented to pay the same upon being advised of the true amount thereof after judgment therefor.

688 ADDITIONAL FORMS—APPLICATION FOR NEW TRIAL.

5. That the primary creditor has not accepted or rejected the said admission, as I am advised by the said solicitors.

6. The primary debtor is desirous of having the remainder of the moneys in the hands of the garnishees released from the garnishee summons herein.

7. The garnishees have no notice of any other claims upon or attachment of the said moneys.

Sworn, etc.

(Rule 283, *ante* pp. 285, 290.)

268. APPLICATION FOR NEW TRIAL.

(*Court and Cause.*)

The above-named defendant hereby applies for a new trial of this action, and asks that judgment of non-suit be entered, or that the action be dismissed on the following among other grounds:—

1. The judgment was contrary to law and evidence and the weight of evidence.

2. The learned judge should have found that the claim of the plaintiff had been paid.

3. The learned judge should have found that the plaintiff's claim was barred by the Statute of Limitations.

4. A..... B..... was a necessary and material witness for the defendant, and the defendant was unable, notwithstanding reasonable diligence, as is shown by the affidavit hereto annexed, to obtain his attendance.

5. One A..... B....., whose affidavit is hereto annexed, could have given material evidence on behalf of the defendant, and the defendant did not know and could not by reasonable diligence have discovered that the said A..... B..... could have given such evidence prior to the trial.

6. The evidence given by C..... D..... at the said trial, and which was objected to by the defendant, was inadmissible, and should not have been received.

7. The evidence tendered by the defendant at the said trial, and which was rejected by the learned judge, should have been received.

(WHERE ACTION TRIED BY JURY.)

8. The learned judge was wrong in directing the jury that it was necessary for the defendant to produce a receipt showing the payment made by him.

9. The learned judge was wrong in directing the jury that in the absence of a written acknowledgment by the defendant the debt was barred by the Statute of Limitations.

And in support of such application the defendant annexes the affidavit of himself, and of A..... B..... and C..... D.....

Dated, etc.

X..... Y.....,
Defendant's Solicitor.

(See p. 247.)

269. AFFIDAVIT TO OBTAIN A WARRANT TO BRING UP A PRISONER.

I, ..., of, the plaintiff, (or defendant), make oath and say:—That the above action is appointed to be tried at this court on the day of, A.D. 18, and that E..... F....., now a prisoner confined in (state the prison), will be a material witness for me upon the said trial; and I further say that I am advised and verily believe that I cannot safely proceed to the trial of the said action without the testimony of the said E..... F....., and I do hereby make application for a writ of *habeas corpus*, in order that the said E..... F..... may be brought before this court to be examined as a witness on my behalf.

270. SUMMONS UNDER SECTION 284 FOR ASSAULTING A BAILIFF OF THE COURT WHILST IN THE EXECUTION OF HIS DUTY.

In the Division Court in the County of
In the matter of a complaint made by C..... D....., of , Bailiff
of the said court, and section 284 of The Division Courts Act.
To A..... B....., of

You are hereby summoned to appear at a sitting of the Division Court to be holden at , on the day of , 18 , at o'clock in the forenoon, to answer a complaint made against you by C..... D....., the bailiff of the said court, and to show cause why an order should not be made against you, under the 276th section of The Division Courts Act, for payment of a sum not exceeding \$20 for an assault committed by you on , the day of , upon the said bailiff whilst in the execution of his duty as such bailiff [and also for that you did on the same day rescue, or attempt to rescue, certain goods levied by the said bailiff under process of this court].

Dated this day of , 18 .

Judge.

(To be served personally ten clear days before the return day.)

(See p. 480)

(Section 104, ante p. 163.)

271. ORDER FOR SUBSTITUTIONAL SERVICE.

(Court and Cause.)

Upon reading an affidavit of of in the County of ,
sworn the day of , 18 :—

It is ordered that the delivery of a copy of the summons issued in this action, to some adult inmate at the usual or last known place of residence or business of the above-named defendant C..... D....., situate and being at , in the County of (or that the delivery of a copy of the summons issued in this action to E..... F....., the agent of the defendant, at his office, as such agent in the of ; or that mailing of a copy of the summons issued in this action by letter, prepaid and registered, addressed as follows:—C..... D....., 109 Bathurst Street, Toronto; or that notice of the issue of the summons in this action be published in the , and that the publication of such notice) shall be deemed to be good and sufficient service of the summons upon the said C..... D..... on the day of such delivery (mailing or publication).

It is further ordered that all further notices and orders in the suit, up to judgment, may be served in the same manner.

It is further ordered that a sealed copy of this order be delivered (or mailed) with the said copy of the said summons.

Dated this day of , 18 .

Judge.

In the Division Court in the County of

In the matter of section 169 of The Division Courts Act.

To A..... B....., Clerk of the Township of

Take notice that it is alleged that you have neglected or refused to furnish the clerk of this court, within the limits of which the municipality for which you are clerk is partly (or wholly) situate, with a correct copy of the voters' list of the said municipality, published in the present year, and you are hereby summoned to appear at the sittings of this court, to be held at _____, in the said County of _____, on the _____ day of _____, A.D. 18____, at the hour of _____ o'clock in the _____ noon, to show cause why you have refused or neglected to comply with the provisions of the 169th section of The Division Courts Act.

Clerk.

(Section 91, *ante* p. 147.)

(Court and Cause.)

It appearing tht the cause has been entered in the wrong Division Court I hereby order that all papers and proceedings in this cause be transferred to Division Court in the County of _____, in pursuance of section 87 of the Division Courts Act, upon the terms (that) the defendant shall in no case have taxed against him or pay more costs than if he had been originally sued in such last-mentioned court, and that the plaintiff do pay to the defendant forthwith the sum of \$ _____ as fees for the attendance of himself and his witness at this court, as the case may be, or any other terms that the judge may think proper to impose).

Dated this day of , 18 .

Judge.

I hereby certify that all the costs incurred in this suit up to and inclusive of the date of transfer thereof are as follows:—

Bailiff's fees.—Service.....	\$0	40
A. R. P.....	15	
Mt.....	24	
Call.....	15	
Clerk's fees.—R.C.....	15	
Sum.....	50	
Copy.....	20	
Witness fees.....	3	00
Jury fund.....	03	

Total \$

Clerk.

To the Clerk Division Court
in the County of

(Sec. 118, ante p. 205.)

274. ORDER FOR THE EXAMINATION OF THE DEFENDANT, AND FOR PRODUCTION OF BOOKS, ETC.

(Court and Cause.)

Upon hearing _____ and upon reading the affidavit of _____ sworn the _____ day of _____, A.D. 18 _____, it is ordered that the defendant do (upon payment of the proper charges for conduct money) attend before the judge of this court, at his chambers in the Court House, in the _____ of _____, on the _____ day of _____, instant, at ten of the clock in the forenoon, or at such time as chambers may thereafter be held, and be examined upon oath, and there and then produce any books, or documents, or copies of or extracts therefrom, pursuant to the 111th section of The Division Courts Act, and particularly the following:—(here describe them shortly.)

Dated the _____ day of _____, A.D. 18 _____.

Judge.

(Should the order be for the examination and production before some one else, the above form can easily be changed.)

(See p. 196.)

275. ORDER FOR LEAVE TO DEFEND UNCONDITIONALLY.

(Court and Cause.)

Upon hearing _____ and upon reading the affidavit of _____ sworn the _____ day of _____, A.D. 18 _____, and _____, it is ordered that the defendant be at liberty to defend this action unconditionally, and that the cost of this application be _____

Dated the _____ day of _____, A.D. 18 _____.

Judge.

(See pp. 196, 204.)

276. ORDER FOR LEAVE TO DEFEND AS TO PART ON PAYMENT INTO COURT, AND UNCONDITIONALLY AS TO RESIDUE.

(Court and Cause.)

Upon hearing _____ and upon reading the affidavit of _____ sworn the _____ day of _____, A.D. 18 _____, and _____, it is ordered that if the defendant pay into court within _____ days from the date of this order the sum of \$ _____ he be at liberty to defend this action as to the whole of the plaintiff's claim in this cause, and it is ordered that if that sum be not so paid the plaintiff be at liberty to have the clerk of this court forthwith enter judgment for that sum, which the said clerk is hereby empowered to do, and the defendant be at liberty to defend this action as to the residue of the plaintiff's claim; and it is ordered that the cost of this application be _____

Dated this _____ day of _____ A.D. 18 _____.

Judge.

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Judge.

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Clerk.

(See pp. 188, 204.)

277. ORDER FOR JUDGMENT UNDER SECTION 116, AND RULE 129.

(Court and Cause.)

Upon hearing the solicitors for the plaintiff and defendant, upon reading the affidavits of _____ filed, and it appearing that the defence set up by the defendant applies only to a part of the plaintiff's claim (or it appearing that \$ _____ of the plaintiff's claim is admitted to be due);

It is ordered at the request of the plaintiff that the plaintiff be at liberty to have the clerk of this court enter, and the clerk is hereby empowered to enter, final judgment in favor of the plaintiff against the defendant for \$ _____, part of the amount sought to be recovered in this action, without prejudice to the plaintiff's right to proceed with this action against the defendant for the remainder of the amount claimed.

It is further ordered that the costs of this application be, etc.

Dated the _____ day of _____, A.D. 18 ____.

Judge.

(See p. 204.)

278. ORDER FOR LEAVE TO DEFEND ON PAYMENT INTO COURT UNDER SECTION 116.

(Court and Cause.)

Upon hearing _____ and upon reading the affidavit of _____, sworn the _____ day of _____, A.D. 18 ____, and _____, it is ordered that if the defendant pay into court within _____ days from the date of this order the sum of \$ _____ he be at liberty to defend this action, but if that sum be not so paid the plaintiff be at liberty to have the clerk of this court, which the clerk is hereby empowered to do, enter final judgment for the amount of the plaintiff's debt or money demand sought to be recovered in this action, as appears by the particulars of claim or demand endorsed on (or attached to) the special summons herein, with interest, if any, and costs, and that in either event the costs of this application be _____.

Dated the _____ day of _____, A.D. 18 ____.

Judge.

(Sec. 141, ante pp. 254, 256.)

279. ORDER FOR COMMISSION.

(Court and Cause.)

Upon hearing the solicitor for the plaintiff and defendant and upon reading the affidavit of _____ filed,

It is ordered as follows:—

1. A commission may issue directed to _____ of _____ for the examination *visa voce* of witnesses on behalf of the said plaintiff and defendant respectively at _____ aforesaid before the said commissioner.

2. _____ days previously to the sending out of the said commission the said _____, or his solicitor, shall give to X _____ Y _____, the solicitor of the said _____, notice in writing of the mail or other conveyance by which the commission is to be sent out.

3. The costs of this order and of the commission to be issued, and all other matters which may be done in pursuance hereof, shall be costs in the cause

Dated _____ day of _____, A.D. 18 ____.

Judge.

(Sec. 141, pp. 254, 256.)

280. COMMISSION TO TAKE EVIDENCE.

In the Division Court, in the County of

Between A..... B....., *Plaintiff*,
and
C..... D....., *Defendant*.

To E..... F....., of :—

Know ye that we, in confidence of your prudence and fidelity, have appointed you, and by these presents give you power and authority to examine *visa voce* G..... H....., I..... J....., and K..... L....., witnesses on behalf of the said ; and we command you as follows:—

1. Both the said A..... B..... and the said C..... D..... shall be at liberty to examine *visa voce* such witnesses as shall be produced on their behalf, with liberty to either party to cross-examine the said witnesses; the party producing any witness for examination being at liberty to re-examine *visa voce*, and all such *visa voce* questions, whether on examination, cross-examination, or re-examination, shall be reduced into writing, and that the answers thereto shall be returned with the said commission.

2. Not less than forty-eight hours before the examination of any witness on behalf of either of the said parties, notice in writing, signed by you, and stating the time and place of the intended examination, and the names of the witnesses to be examined, shall be given to the other party by delivering the notice to , at his office in the of (or to a grown-up person there).

3. In the event of any witness, on examination, cross-examination, or re-examination, producing any book, document, letter, paper, or writing, and refusing for good cause, to be stated in the deposition, to part with the original thereof, then a copy thereof, or extract therefrom, certified by you to be a true and correct copy or extract, shall be annexed to the witness' deposition.

4. Each witness to be examined shall be examined on oath, affirmation, or otherwise, in accordance with his or her religion.

5. If any one or more of the witnesses do not understand the English language, the questions being previously translated into the language with which he (she or them) is (or are) conversant, then the examination shall be taken in English through the medium of an interpreter, or interpreters, to be nominated by you, and to be previously sworn according to his or her religion by or before you, truly to interpret the questions to be put to the witnesses, and his, her, or their answers thereto.

6. The depositions to be taken under this commission shall be subscribed by the witness or witnesses and by you. Provided, that if the examining party desires to have such examination taken in shorthand, you may take the same in shorthand, or employ a shorthand writer approved by you, and by you duly sworn, in which case the examination may be taken down by question and answer, and it shall not be necessary for the depositions to be read over or signed by the person examined unless any of the parties so desire, and a copy of the depositions so taken shall be certified by you, or in case the same shall be taken in shorthand by some person employed for the purpose as aforesaid, certified by such shorthand writer as correct, and signed by you.

7. The depositions, together with any documents referred to therein, or certified copies thereof, or extracts therefrom, shall be sent to , clerk of the Division Court in the County of , at on or before the day of , enclosed in a cover under your seal.

8. Before you in any manner act in the execution hereof you shall take the oath hereon endorsed on the Holy Evangelists, or otherwise in

such other manner as is sanctioned by the form of your religion and is considered by you to be binding on your conscience.

Witness, _____ Esq., Judge of the said court, at _____, the
day of _____, in the year of our Lord one thousand eight hundred and _____

Clerk.

{ Seal. }

(Sec. 141, pp. 254, 256.)

INSTRUCTIONS AS TO THE EXECUTION OF THE WITHIN COMMISSION.

(To be endorsed on commission.)

1. See that the proper notice is given to the parties concerned.
2. Follow all the directions and requirements of the commission strictly.
3. When executed, annex *visa voce* questions, depositions, exhibits, affidavits, and other papers, firmly to the commission, and enclose them all in an envelope. The commissioner should put his seal on the envelope and write his name opposite the seal.
4. Endorse the style of cause on the back of the envelope and the word "Commission," and address it to _____, and pay the postage on it.
5. The affidavit, affirmation, or declaration of execution, and the oath necessary for the commissioner to take before entering on the execution of the commission, should be made, affirmed, or declared by the commissioner before any commissioner authorized to administer oaths in the Supreme Court of Judicature in England or Ireland, or before a judge of the Supreme Court of Judicature in England; or of the Court of Session or the Justiciary Court in Scotland; or before a judge of any of the County Courts in Great Britain or Ireland, within his county, or before any notary public, certified under his hand and official seal, or before any commissioner authorized to administer oaths in the High Court of Justice for Ontario, or before the mayor or chief magistrate of any city, borough, or town corporate in Great Britain or Ireland, or in any colony of Her Majesty without Canada, or in any foreign country, and certified under the common seal of such city, borough or town corporate, or before a judge of any Court of Record or of Supreme Jurisdiction in any colony without Canada, belonging to the Crown of Great Britain, or any dependency thereof, or in any foreign country, or, if made in the British possessions in India, before any magistrate or collector certified to have been such under the hand of the governor of such possession, or, if made in Quebec, before a judge or prothonotary of the Superior Court, or clerk of the Circuit Court, or before any consul, vice-consul, or consular agent of Her Majesty, exercising his functions in any foreign place, or before a commissioner authorized by the laws of Ontario to take affidavits in and for any of the Courts of Record of the province for the purpose of and in or concerning any cause, matter, or thing depending or in anywise concerning any of the proceedings to be had in the said courts.

The affidavit of execution of the commission should show the following facts:—

1. The style of the court and cause.
2. The names, residence, and addition of the deponent in full.
3. The taking of the proper oaths by the commissioner.
4. The writing down of the evidence taken, and that it was truly and correctly done.
5. Identifying the *visa voce* questions and evidence taken, and annexed to the commission, as being those administered and taken under the commission.

COMMISSIONER'S OATH.

You shall, according to the best of your skill and knowledge, truly and faithfully, and without partiality to any or either of the parties in this cause, take the examinations and depositions of all and every witness and witnesses produced and examined by virtue of the commission within written. *So help you God.*

CLERK'S OATH.

You shall truly, faithfully, and without partiality to any or either of the parties in this cause, take, write down, transcribe, and engross all and every the questions which shall be exhibited or put to all and every witness and witnesses, and also the depositions of all and every such witness and witnesses produced before and examined by the said commissioner named in the commission within written, as far forth as you are directed and employed by the commissioner to take, write down, transcribe, or engross the said questions and depositions. *So help you God.*

WITNESS' OATH.

You are true answer to make to all such questions as shall be asked you, without favor or affection to either party, and therein you shall speak the truth, the whole truth, and nothing but the truth. *So help you God.*

INTERPRETER'S OATH.

You shall truly and faithfully, and without partiality to any or either of the parties in this cause, and to the best of your ability, interpret and translate the oath or oaths, affirmation or affirmations, which shall be administered to, and all and every the questions which shall be exhibited or put to all and every witness and witnesses produced before and examined by the commissioner named in the commission within written, as far forth as you are directed and employed by the said commissioner to interpret and translate the same out of the English into the language of such witness or witnesses, and also in like manner to interpret and translate the respective depositions taken and made to such questions out of the language of such witness or witnesses into the English language. *So help you God.*

RETURN TO COMMISSION.

The return of the within commission will appear by the depositions, affidavits, and papers annexed.

(Signature of Commissioner.)

(Sec. 143, p. 250.)

281. ORDER FOR EXAMINATION OF SICK, AGED, OR INFIRM WITNESSES.

(Court and Cause.)

Upon the application of the _____ and upon reading the affidavit of _____, and upon hearing that _____, it is ordered that _____, a witness on behalf of _____, be examined *viva voce*, on oath or affirmation, before _____.

It is further ordered that a copy of this order, with two days' notice of the time and place of the examination, shall be served upon the solicitor or agent, who may appear and cross-examine the witnesses.

It is further ordered that the evidence shall be taken on oath and shall be reduced to writing and signed by the witness, and shall be transmitted to the clerk of the court, and shall be by him kept on file and may be

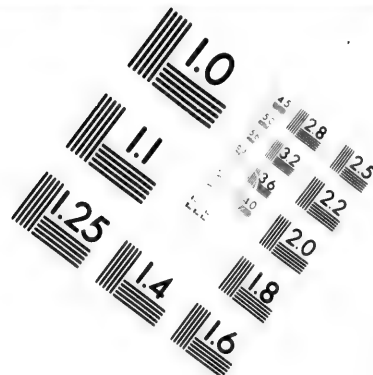
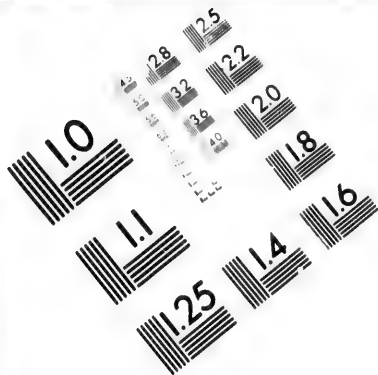
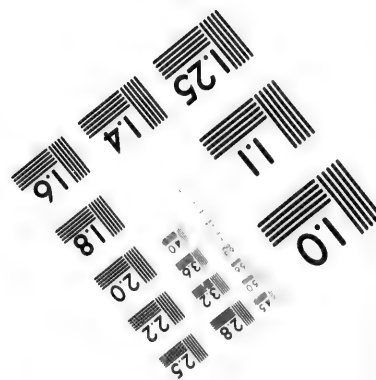
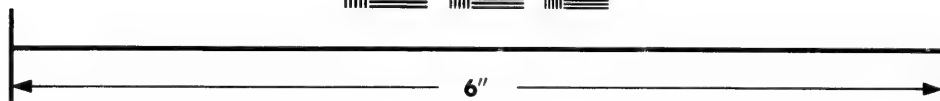
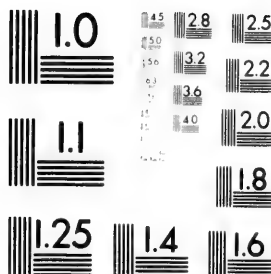


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(716) 872-4503

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used upon the trial, saving all just exceptions, without any further proof of the absence of the witness than the affidavit of the
his solicitor or agent, as to his belief.

It is further ordered that the costs of this order and the charge of the examiner, which is hereby fixed at \$ per hour, and which is in the first instance to be paid by the , shall be costs in the cause, unless otherwise ordered at the trial.

282. ORDER APPOINTING GUARDIAN OF INFANT DEFENDANT, WHERE DEFENDANT DOES NOT NAME A GUARDIAN.

Whereas, now at the hearing of this action the defendant, being an infant, appears here in court, and does not name a guardian, E..... F..... of , is hereby appointed to be guardian of the defendant, to act on his behalf in this action.

283. ORDER APPOINTING GUARDIAN NAMED BY INFANT DEFENDANT.

Whereas, now at the hearing of this action the defendant, being an infant, appears here in court, and names of to act as his guardian, who now assenting to act as such guardian is hereby appointed to be guardian of the defendant, to act on his behalf in this action.

(Rule 25.)

284. ORDER FOR RENEWAL OF SUMMONS.

(Court and Cause.)

Upon the application of the plaintiff, upon reading the affidavit of , and it appearing that reasonable efforts have been made to serve the defendant with the summons herein (*or other good reason*);

It is ordered that the service of the writ of summons in this action shall be good if made within twelve months from the date of this order.

Dated day of , 18 .

285. ORDER STAYING PROCEEDINGS WITH A VIEW TO APPEAL.

Upon the application of the plaintiff (*or defendant*), I hereby order that proceedings herein be stayed for ten days, from the day of , A.D. 18 , in order to afford the plaintiff (*or defendant*) time to give the security required to enable him to appeal in the cause. (*If the security is to be in a bond less than \$100, or by payment into court of a less sum than \$50, add: And I direct that such security may be by bond in the sum of \$, or by paying into court the sum of \$*).

Dated this day of , 18 .

.....
Judge.

(Sec. 200, p. 355.)

286. ORDER DISCHARGING MONEYS FROM CLAIM OF PRIMARY CREDITOR.

In the Division Court, in the County of
His Honor Judge , } the day of , 18 .
in Chambers.
Between A..... B....., *Primary Creditor*,
and
C..... D....., *Primary Debtor*.
and
E..... F....., *Garnishee*.

Upon the application of the primary debtor, and upon reading the garnishee summons herein, and the affidavit of

1. It is ordered that all sums due or accruing due by the garnishee to the primary debtor (except the sum of \$) be discharged from the claim of the primary creditor under the garnishee summons and proceedings herein.

(See p. 436.)

287. ORDER UPON A JUDGMENT SUMMONS ALTERING AN ORIGINAL JUDGMENT OR ORDER UNDER SECTION 252.

(Insert title of Court and Style of Cause.)

Whereas the plaintiff obtained a judgment against the defendant in this court on the day of , 18 , for the payment of \$ for debt (or damages), and \$ for costs, and in payment thereof (or of \$, part payment thereof) the defendant hath made default, and there remains now \$ due thereon.

And whereas a summons was, at the instance of the plaintiff, duly issued out of this court, by which the defendant was required to personally appear at this court on the day of , 18 , to be examined on oath according to the provisions and requirements of section 243 of the Act, which summons was proved to this court to have been duly served on the defendant.

It is ordered that the defendant do pay the amount still due on the said judgment, and the costs of the said summons, and incident thereto, as stated at the foot of this order, to the clerk of this court, by instalments as follows, viz.:—

[Here specify the instalments, the amounts by which and times when they are to be paid] the first payment to be made on the day of , A.D. 18 .

Given under the seal of the court this day of , A.D. 18 .

GABRIEL GUPPY,
Clerk of the Court.

Amount on judgment\$
Costs of judgment summons and its hearing.....\$
Interest.....\$
Total.....\$

(Sec. 36, p. 23.)

288. CERTIFICATE OF JUDGE'S APPROVAL OF CLERK'S OR BAILIFF'S COVENANT.

I hereby certify that the within covenant is for the sums which I directed, and I hereby approve of and declare such covenant sufficient.

.....
Judge.

(Page 450.)

280. ORDER CHANGING PLAN OF DISTRIBUTION.

In the Division Court, in the County of

In the matter of Alfred Jones, an absconding debtor.

Upon the application of George Brown, one of the execution creditors of the said Alfred Jones, and upon hearing the solicitors for John Smith and Sarah Jones, other execution creditors of the said Alfred Jones;

It is ordered that the plan of distribution prepared by the clerk of this court be changed by striking out of the same the portion thereof relating to the claim of the said Sarah Jones, and that the said distribution be proceeded with by the clerk of this court as if no execution had been obtained by the said Sarah Jones.

(Sec. 37, p. 30.)

290. CERTIFICATE OF CLERK OF THE PEACE THAT CLERK'S OR BAILIFF'S COVENANT HAS BEEN FILED.

I hereby certify that the covenant of A..... B....., as clerk (or bailiff) of the Division Court for the County of, with C..... D....., of, etc., (addition), and E..... F....., of, etc. (addition), as his sureties therein, approved and declared sufficient under the hand of the judge of the said county, has this day been duly filed in the office of the Clerk of the Peace in and for the County of

Dated this day of , A.D. 18 .

.....
Clerk of the Peace in and for
the County of

(Rule 36, p. 467.)

291. ORDER FOR SALE OF PERISHABLE GOODS OR GOODS WHICH INCUR EXPENSE FOR FOOD OR KEEPING.

(Court and Cause.)

Upon the application of and upon reading the affidavit of and upon hearing the solicitors for the parties, and it appearing that the horse which is the subject-matter of this action is incurring charge for food and keeping, and that it is proper that the same should be sold at once;

It is ordered that the said horse be forthwith sold by the bailiff of this court by public auction, and that the proceeds thereof shall be paid into court to abide the event of this action.

And it is further ordered that the said sale shall be without prejudice to the rights of the parties in any question which may arise in the action.

And it is further ordered that the costs of this application be costs in the cause.

(Sec. 39, p. 31.)

292. CERTIFICATE OF CLERK OF THE PEACE ON COPY OF COVENANT.

I hereby certify that the within is a true copy of the covenant of A..... B....., clerk (or bailiff) of the Division Court for the County of, and C..... D..... and E..... F....., his sureties, together with all copies of affidavits of execution and justification, and endorsements thereon, filed in the office of the Clerk of the Peace for the said County of

Given under my hand this day of , A.D. 18 .

.....
Clerk of the Peace in and for the County
(or United Counties) of

(Section 36 p. 23.)

293. CERTIFICATE OF APPROVAL OF APPEAL BOND BY JUDGE.

Approved of by me this _____ day of _____, A.D. 18 ____.

Judge.

(Rules 224-226, pp. 181, 182.)

294. ORDER TO CONTINUE PROCEEDINGS AGAINST NEW PARTY.

(Court and Cause.)

Upon hearing _____, who alleged (*state circumstances rendering the order necessary*);

It is ordered that the proceedings in this action be carried on between the plaintiffs (*name the continuing plaintiffs*) and the defendants (*name the continuing defendants*), and A..... B....., the person upon whom the interest or liability has devolved.

Dated, etc.

Judge.

(Rule 293, p. 260.)

295. ORDER STAYING PROCEEDINGS.

(Court and Cause.)

Whereas the above actions have been commenced in this court against the said C..... D....., for or in respect of a cause of action arising out of the same breach of contract, or wrong, or breach of duty; and whereas the said C..... D..... has filed an undertaking to be bound as far as his liability to the plaintiffs, A..... B..... and E..... F....., in the said actions is concerned by the court in one of such actions;

It is ordered that all proceedings in the second-mentioned action be stayed until judgment shall have been given in the first-mentioned action.

It is further ordered that the costs of this application and of the order consequent thereon be costs in the first-mentioned action, and abide the event thereof.

And it is further ordered that this order shall be drawn by _____, and served on the said A..... B..... and E..... F.....

Judge.

(See. 114.)

296. ORDER FOR RECEIVER.

(Court and Cause.)

Upon the application of the plaintiff, upon reading the affidavit of _____, and upon hearing counsel for the plaintiff, no one appearing on behalf of the defendant, although duly notified;

It is ordered that _____, the above-named plaintiff, be appointed receiver of the share or interest which _____, the above-named defendant, is entitled to under the will of _____ until the judgment recovered by the plaintiff against the said defendant, together with interest and costs, shall be fully paid.

It is further ordered that the costs of this application be added to the judgment debt.

Judge.

(Rule 204, pp. 270-272.)

297. ORDER FOR SECURITY FOR COSTS.

(Court and Cause.)

Upon the application of the defendant, and it appearing that the plaintiff ordinarily resides at Rochester, in the State of New York;

It is ordered that all proceedings in this action be stayed until the plaintiff shall give security for the costs of the defendant, either by payment into court of the sum of \$, or by a bond with one surety for the sum of \$, to be approved of by the judge of this court, or by the defendant or his solicitors.

It is further ordered that on the approval of the said bond the same shall be filed with the clerk of this court, and that the stay of proceedings shall thereupon be at an end.

It is further ordered that the bond, when given, or the money, when paid in, shall be subject to the further order of the judge of this court.

And it is further ordered that the costs of this application be costs in the cause; and leave is hereby reserved to the plaintiff, notwithstanding the stay of proceedings, to move for an adjournment of the trial of this action at any sittings of the court when the same shall come on for trial.

.....
Judge.

(Rule 35 (f), p. 466.)

298. NOTICE TO CREDITOR OF CLAIM TO GOODS TAKEN IN EXECUTION.

(Court and Cause.)

Take notice that A..... B..... has claimed the goods (or certain goods; where only certain goods are claimed here enumerate them) taken in execution by me under the warrant of execution issued in this action. If you insist upon my maintaining such seizure you must deposit forthwith with the clerk of this court a sufficient sum of money to indemnify the said clerk and me against our costs of an interpleader.

\$ will be a sufficient sum.

Dated, etc.

.....
Bailiff.

To the above-named plaintiff.

(Rule 62, p. 59.)

299. NOTICE OF PAYMENT INTO COURT IN REPLEVIN.

(Court and Cause.)

The defendant brings into court the sum of \$, damages and the costs to this date, and consents that the replevin bond be delivered up to be cancelled, and waives all right to the property replevied.

Dated, etc.

.....
Defendant.

(This should be signed by defendant.)

300. NOTICE DISPUTING JURISDICTION.

(Court and Cause.)

You are hereby required to take notice that I dispute the jurisdiction of this court to entertain and try this cause.

Dated this day of , A.D. 18 .

C..... D....., *Defendant; or*
E..... F....., *Solicitor (or agent)*
for the defendant.

To A..... B.....

The Plaintiff, and to the Clerk of this Court.

301. NOTICE OF MOTION FOR IMMEDIATE JUDGMENT.

(Court and Cause.)

Take notice that a motion will be made on behalf of me, the above-named plaintiff, before the judge of this court, at his chambers, in the Court House, in the _____ of _____, in the said County of _____, on _____ day the _____ day of _____, A.D. 18 _____, at _____ o'clock in the _____ noon, or so soon thereafter as the motion can be heard, for judgment herein; and the above-named defendant is hereby required to show cause before the said judge why the plaintiff should not be at liberty to have final judgment entered in his favor by the clerk of this court for the amount of the debt sought to be recovered in this action with interest and costs.

And take notice that in support of such motion will be read the affidavit of _____ filed.

Dated this day of , A.D. 18 .

Yours, etc.,

A..... B....., *Plaintiff; or,*
E..... F....., *Solicitor (or agent) for the*
above-named plaintiff in this action.

To C..... D.....

The above-named defendant herein.

[N.B.—If given to any other person who has authority to receive the notice, address it accordingly; and if any other affidavit is to be used reference should be made to it and a copy served.] (See p. 198.)

(Sec. 158, p. 303.)

303. NOTICE OF APPEAL AND THE GROUNDS THEREOF.

(In the Court of Appeal.)

In a cause in appeal from the Division Court for the County of , in which A..... B..... is plaintiff, and C..... D..... defendant. Take notice that this cause has this day been set down for argument in appeal before a judge of this court for the day of , A.D. 18 , and that such cause, having been appealed, will then be heard, and the grounds of such appeal are as follows:—

1. [*Here, in separate paragraphs, set out clearly and concisely the grounds of appeal relied on.*]

Dated this day of , A.D. 18 .
A..... B.....,
Appellant (or) solicitor for appellant).

To C..... D.....

The Respondent (*or to the counsel, solicitor, or agent, of the respondent, as the case may be, naming him*).

[It is difficult to comply strictly with the ambiguous words, "shall give notice thereof and of the appeal." It has, however, been attempted in the above form. The notice must be served according to section 158. During the intervening seven days, the parties can, if not already done, instruct their counsel for the argument of the case, and otherwise prepare for the hearing of the appeal.]

(Rule 221, pp. 180, 182.)

304. NOTICE TO PARTIES WHOSE NAMES ARE ADDED AS DEFENDANTS.

(Court and Cause.)

I hereby give you notice that by an order of this court, dated the day of , a copy of which order is hereunto annexed, together with a copy of the summons in the action, you were ordered to be added as one of the defendants in the above action.

And further take notice that the hearing of the above action has been adjourned to the day of , at o'clock in the forenoon, and that if you do not attend at the Court House at upon the day and at the hour above mentioned, either in person or by your solicitor, such order will be made and proceedings taken as the judge may think fit.

.....
Clerk.

(Rule 287, pp. 205, 248.)

305. NOTICE TO PRODUCE DOCUMENTS FOR INSPECTION.

(Court and Cause.)

Take notice that the plaintiff (*or defendant*) requires you to produce for his inspection, at some place, to be appointed by you, within the division in which this action is pending the following documents referred to in your particulars of claim (*or of defence, or affidavit*):—

[*Describe the documents required.*]

Dated the day of , A.D. 18 .

To Z.....
Solicitor for

X..... Y.....,
Solicitor for the

306. NOTICE OF INTENTION TO GIVE COPIES OF LETTERS, TELEGRAMS,
AND OTHER WRITTEN INSTRUMENTS IN EVIDENCE.

(Court and Cause.)

Take notice that the _____ in this cause intend _____ at the trial hereof
to give in evidence the copies of documents hereinafter mentioned as proof
of the contents of the original documents of which they purport respect-
ively to be copies, and that the same may be inspected by the
solicitor or agents at the office of _____
on _____ day the _____ day of _____, A.D. 18 _____, between the hours of
10 a.m. and 4 p.m.

This notice is given under section 48 of The Evidence Act, being
chapter 73 of the Revised Statutes of Ontario.

Dated this _____ day of _____, A.D. 18 _____.

To the above-named _____
and to _____
Solicitor.) Solicitor for the above-named

Description of Copies of Documents.	Date.

(Sec. 137, p. 244.)

307. NOTICE TO PRODUCE.

(Court and Cause.)

Take notice that you are hereby required to produce and show to the court on the trial of this action all books, papers, letters, copies of letters, and other writings and documents in your custody, possession or power, containing any entry, memorandum, or minute relating to the matters in question in this action, and particularly *(specify them.)*

Dated the day of , A.D. 18 .

(Signed)

Solicitor for the above-named.

To the above-named , and to
his solicitor *(or agent.)*

308. NOTICE BY DEFENDANT TO THIRD PARTY.

(Court and Cause.)

To Mr. X..... Y....., of *(address and description.)*

Take notice that this action has been brought by the plaintiff against the defendant as surety for M..... N..... upon a bond conditioned for payment of \$ and interest to the plaintiff. The defendant claims to be entitled to contribution from you to the extent of one-half of any sum which the plaintiff may recover against him, on the ground that you are his co-surety under the said bond.

(Or, as surety for the said M..... N....., in respect of the said matter, under another bond made by you in favor of the said plaintiff dated the day of , A.D. 18 .)

(Or, as acceptor of a bill of exchange for \$50 dated the day of , A.D. 18 , drawn by you upon and accepted by the defendant, and payable three months after date. The defendant claims to be indemnified by you against liability under the said bill, on the ground that it was accepted for your accommodation.)

(Or, to recover damages for a breach of contract for the sale and delivery to the plaintiff of one hundred tons of coal. The defendant claims to be indemnified by you against liability in respect of the said contract, or any breach thereof, on the ground that it was made by him on your behalf and as your agent.)

And take notice that if you wish to dispute the plaintiff's claim in this action as against the defendant C..... D....., or your liability to the defendant C..... D....., you must appear at this court on the return day of the summons in this action, a copy of which summons is hereunto annexed.

In default of your so appearing you will be deemed to admit the validity of any judgment obtained against the defendant C..... D..... in this action, whether obtained by consent or otherwise, and your own liability to contribute or indemnify to the extent herein claimed.

(Signed)

C..... D.....,

or, L..... M.....,

Solicitor for the defendant,

C..... D..... .

(Rule 287, pp. 205, 248.)

309. NOTICE TO PRODUCE DOCUMENTS FOR INSPECTION.

Take notice that the _____ requires you to produce for his inspection the documents herein mentioned, in which he has an interest, at some place to be appointed by you within the division in which this suit is pending.

Dated the _____ day of _____, A.D. 18 ____.

Solicitor for

Description of Document.	Dates.

(See pp. 177, 181.)

310. NOTICE BY CLERK TO DEFENDANT OF ASSIGNMENT OF PLAINTIFF'S TITLE TO JUDGMENT UNDER RULE 224.

I hereby give you notice that _____, as executor of the last will and testament of _____, deceased (or as administrator of the estate of _____, deceased); (or as assignee under an assignment dated the _____ day of _____, A.D. 18 ____), has this day filed an affidavit, together with a notice, a copy of which notice is hereunto annexed, stating that he is desirous of being substituted as a plaintiff in the above action against you in the place of _____ (or added as plaintiff with _____), the above-named plaintiff in the above action against you.

And further take notice that unless you appear at the sittings of this court on the _____ day of _____, A.D. 18 ____, at _____ o'clock in the forenoon, and show cause against the same, the said _____ will be substituted for (or made a joint plaintiff with) the above-named plaintiff.

Clerk.

To the above-named defendant.

(Rule 31 (b), p. 450.)

311. PLAN OF DISTRIBUTION.

In the Division Court, in the County of
 In the matter of Albert Jones, an absconding debtor.
 Plan of distribution of the amount levied by the bailiff of the said
 court of the goods of the said debtor.

To total amount levied by sale of goods.....	\$175 80
By bailiff's fees.....	\$10 20
By taxed costs of attaching creditor under whose attachment the seizure was made, Smith v. Chapman.....	7 15
By costs of execution, Smith v. Chapman.....	65
	<u>18 00</u>
Total amount for distribution.....	\$157 80

List of attaching creditors entitled to share in moneys levied of the
 goods of Albert Jones. Interest computed to February 15th, 1895.

No.	Creditor.	Principal.	Costs.	Interest	Total claim	Pro rata share, 88¢c. on \$.	Remarks.
1.	John Smith	\$110 00	\$	\$0 52	\$110 52	\$ 75 70	
2.	George Brown	53 25	3 15	15	56 55	38 73	
3.	Sarah Jones	60 00	3 07	23	63 30	43 37	
					<u>\$230 37</u>	<u>\$157 80</u>	

Dated at , this 15th day of February, 1895.

X..... Y.....
 Clerk.

(Rule 31 (d), p. 450.)

312. NOTICE OF PREPARATION OF PLAN OF DISTRIBUTION.

In the Division Court, in the County of

In the matter of Albert Jones, an absconding debtor.

Take notice that I have prepared for examination, by the said debtor and his creditors, a list of the creditors entitled to share in the distribution of the moneys levied under the warrants of attachment and the executions issued to satisfy judgments of the attaching creditors, showing the amount due to each for principal, interest, and costs, the total amount to be distributed, and the amount going to each according to such ratable distribution.

And take notice that the said plan of distribution may be examined at my office at any time within five days from the day of the date of this notice, and that unless within ten days after the day of the date of this notice objection to such list has been filed with the said clerk the said list shall be binding upon all parties concerned, unless the judge of this court shall otherwise order.

Dated the day of , A.D. 18 .

To the said Albert Jones, and

To John Smith, George Brown, and Sarah Jones.

(Rule 35 (a), p. 465.)

313. CLAIM OF DAMAGES BY CLAIMANT IN INTERPLEADER.

Proceed as in form 168, and add after the word "prove":—

And take notice that the said Edgar French claims \$60 damages from the said Aaron Barr, the above-named plaintiff, and from John Smith, the bailiff of the said court, for or in respect of the seizure of the said property, and that the grounds of the said claim are that the said plaintiff and bailiff broke into and entered his house at _____, and that they there seized and took away the said goods and chattels under the said execution (or judgment).

(Rule 35 (b), p. 466.)

314. CLAIM OF DAMAGES BY CREDITOR.

(Court and Cause, as in form 168.)

Take notice that I, the said execution creditor, claim the sum of \$ _____ from you, the bailiff of this court, for damages arising out of a certain execution in this action, and that the grounds of my claim are as follows:—

[Here state the grounds of the claim.]

That you having seized certain goods and chattels of and belonging to the execution debtor, under process issued from this court at my instance, wrongfully, and without lawful excuse, withdrew from the possession of the said goods and chattels, whereby I was deprived of the fruits of the said execution.

Dated, etc.

To _____,

The Bailiff of this Court.

_____,
Execution Creditor.

(Sec. 128, p. 207.)

315. PLEA OF TENDER.

(Insert title of Court and Style of Cause.)

The defendant, for a plea herein to the plaintiff's claim (or if only to a part of such claim, then specify such part), says that he always was, and still is, ready and willing to pay to the plaintiff the sum of \$ _____, and before action (or, if the debt was payable on a day certain, naming that day, or some day anterior to it on which the tender was made) he tendered and offered to pay the same to the plaintiff, and the plaintiff refused to accept it, and the defendant now brings the said sum into court ready to be paid to the plaintiff.

C..... D.....

(Sec. 131, p. 224.)

316. PLEA OF PAYMENT INTO COURT.

The defendant brings into court the sum of \$ _____ and costs in full satisfaction.

Dated _____ day of _____, A.D. 18 ____.

A..... B.....

(Sec. 250, p. 446.)

317. INVENTORY OF GOODS SEIZED UNDER ATTACHMENT.

An inventory of goods and chattels (property and effects), by me this day seized and taken in the Township of _____, by virtue of a warrant of attachment issued by T. _____, clerk of the Division Court of the County of _____ (or as the case may be) on behalf of A. _____ B. _____, for the sum of \$ _____, against the personal estate and effects of C. _____ D. _____, that is to say:—One lumber waggon, one plough, etc. (stating all the articles seized).

Dated this _____ day of _____, A.D. 18 ____.

B. _____ F. _____,
 Bailiff of the _____ Division Court of the County of _____.

(Sec. 214, p. 373.)

318. FIAT FOR COUNSEL FEE.

(Court and Cause.)

Tax a counsel fee of \$ _____ to the plaintiff or defendant) herein.

Dated this _____ day of _____, A.D. 18 ____.

 Judge.

To the Clerk.

(The fiat may be endorsed on the summons, judgment, or order.)

(Sec. 298, p. 491.)

319. NOTICE OF ACTION.

To A. _____ B. _____, Bailiff of the _____ Division Court, in the County of _____

I hereby give you notice that it is my intention at the end of one calendar month from the service hereof to commence an action against you in the High Court of Justice (or in the County Court of the County of _____, or in the _____ Division Court, in the County of _____) to recover compensation and damages for trespass and excessive levy committed by you and your assistants on the _____ day of _____, A.D. 18 ____, by selling and disposing of certain goods and chattels belonging to me in and upon the premises _____ Street, in the City of Toronto, to satisfy the sum of \$43 and costs under a judgment recovered against me at the suit of E. _____ F. _____ in the _____ Division Court, in the County of _____, on the _____ day of _____, A.D. 18 ____.

Dated the _____ day of _____, A.D. 18 ____.

G. _____ H. _____

(See R. S.O. c. 136, Schedule M.)

320. FORM OF DISCHARGE OF MORTGAGE BY BAILIFF UNDER R.S.O. c. 136, s. 83.

To the Registrar of the County (Division or City, as the case may be) of _____.

I, A.B. of _____, Bailiff of the (number) Division Court of the County (or City, as the case may be) of _____ do certify that by virtue of a writ of execution wherein C. _____ D. _____ is plaintiff and E. _____ F. _____ defendant, issued out of the _____ Division Court of the County (or City) of _____ (or as the case may be) and to me directed, I seized a certain mortgage

made by one J. H., of (as described in said mortgage), bearing date the day of A.D. 19 , and registered at of the clock in the forenoon, Liber , for No. (as the case may be) of the day of in the same year (as the case may be) to E. F., of (as described in the mortgage), the defendant in the said writ of execution named, and such mortgage has not been assigned (or has been assigned to the defendant and such assignment has been registered as follows: here set out date and registration of assignment), and I do further certify that I have levied from the said mortgagor, his executors, administrators or assignees (as the case may be) the full amount of said mortgage (or \$ parcel of said mortgage) and that such mortgage is therefore discharged (or that such mortgage is as to \$ parcel of the moneys thereby payable, discharged).

As witness my hand and the seal of the said court this day of , A.D. 18 .

A. B.

Witness,
L. M. }

(Sec. 156, p. 301.)

322. APPOINTMENT OF AGENT FOR SERVICE.

(Court and Cause.)

Take notice that the above-named has appointed of Street, in the City of Toronto, in the County of York, solicitor, as his agent, upon whom any notice of appeal and all other papers hereafter requiring service herein may be served for him.

Dated this day of , A.D. 18 .

To the judge of the said court.

323. JUDGMENT AGAINST DEFENDANT FOR PAYMENT OF COSTS.

Upon hearing the plaintiff's application at the court holden this day, it is adjudged that the plaintiff do recover against the defendant the sum of \$ for costs incurred by the plaintiff in preparing for trial before the notice of payment of money into court was received by him and in attending court, such money having been so paid in less than five clear days before the return day of the summons.

And it is ordered that the defendant do pay the same to the clerk of this court on the day of , A.D. 18

(See pp. 372, 373.)

324. MINUTE IN PROCEDURE BOOK WHERE COSTS ORDERED TO BE PAID UNDER SECTION 213.

The defendant having disputed the plaintiff's claim, but afterwards, and before the opening of the court, confessed judgment (or paid the said claim), but the time of his doing so being too shortly before the sitting of the court for the plaintiff to be notified thereof—and it appearing that without such notice the plaintiff incurred reasonable expenses in procuring witnesses and in attending the court (or if no witnesses attended omit the foregoing words, "in procuring witnesses and"), whereby the judge ordered and it is adjudged that the defendant do pay the sum of \$ within days (or forthwith).

325. JUDGMENT AGAINST DEFENDANT FOR PLAINTIFF'S COSTS OF PROCEEDING TO TRIAL UNDER SECTION 215.

Upon hearing the plaintiff's application at a court holden this day, it is adjudged that the plaintiff do recover against the defendant the sum of \$ for costs incurred by the plaintiff in preparing for trial (or in attending court), the defendant having given notice of defence without intending to defend this action, and not having given the plaintiff notice of his intention not to defend, or withdrawing his defence (or having given notice of defence, whereby the plaintiff was obliged to prepare for trial, and subsequently paid the debt and part of the plaintiff's costs to the clerk, but not having given notice of his intention to withdraw his defence). (See p. 375.)

326. JUDGMENT WHERE ONE JUDGE ACTS FOR ANOTHER UNDER SECTION 23.

This (as the case may be) was made (or granted) and signed by Judge Z....., acting in the matter for Judge A....., under the provisions of section 22 of The Division Courts Act. (See p. 17.)

327. WHERE PLAINTIFF CONSENTS TO THE CONFESSION BEING TAKEN BY INSTALMENTS, OR FOR LESS THAN AMOUNT CLAIMED.

(Style of Court and Cause.)

I, A..... B....., the plaintiff in this cause, consent that confession be taken for the amount of my claim in this cause (or for \$, part of my claim in this cause, and I abandon the residue, or I allow \$ of the defendant's counterclaim (or set-off), or I allow \$ for proper deductions), and claim judgment for the amount confessed, and I am willing that the same be payable by the following instalments, viz.:—(here state the amounts and times for payment).

Dated this 20th day of June, 1891

A..... B.....,
Plaintiff.

(Rule 102, pp. 370-373.)

328. JUDGMENT AGAINST DEFENDANT ON CONFESSION BEFORE ACTION.

C..... D....., being indebted to A..... B..... in the sum of \$ for a debt, and having acknowledged the same in writing (with particulars attached thereto) before G..... L....., clerk (or bailiff) of this court, and the same being duly proved and produced to the judge, and the said A..... B..... requesting judgment thereon, it is adjudged that the said A..... B..... do recover against the said C..... D..... the said sum of \$ for debt, and \$ for costs.

(See pp. 371, 383.)

329. JUDGMENT ON CONFESSION AFTER ACTION.

The defendant having been served with summons and particulars of claim for a debt amounting to \$ (or the plaintiff having consented to take the defendant's acknowledgment for the sum of \$, part thereof, and abandoned the residue; or having allowed the defendant's set-off thereout; or made certain deductions claimed therefrom), and the defendant having confessed the same in writing before G..... L....., clerk (or bailiff), and the confession being duly proved and produced.

(Conclude as in the preceding form.)

(See Sec. 72 (3), pp. 83, 90.)

330. JUDGMENT FOR DEBT AND UNLIQUIDATED DAMAGES.

Judgment for the plaintiff* for \$ in respect of the claim for money lent (or as the case may be), and for \$ in respect of the claim for damages for trespass (or as the case may be), together with \$ costs, to be paid in days.

(When an excess has been abandoned, add, "Being in full discharge of his causes of action set forth in the claim.")

*Add, "On verdict by jury," if such be the fact.

(See p. 435.)

331. WARRANT FOR DISCHARGE OF PRISONER.

(Court and Cause.)

I hereby certify that C..... D....., who was committed to your custody by virtue of an order of commitment under the seal of this court, bearing date the day of , 18 , has satisfied the debt (or demand) payable and the costs remaining due at the time the order was made, and may in respect of such order be forthwith discharged out of your custody.

.....,
Clerk.

To the Gaoler, County of

(See 153. p. 291.)

332. JUDGMENT WHERE EXECUTION POSTPONED BY CONSENT OF JUDGMENT CREDITOR BEYOND FIFTY DAYS.

Judgment* for the plaintiff for \$ debt, and \$ for costs, to be paid as follows:—(Here state the time when or the instalments by which the judgment is to be satisfied) the plaintiff (or the party entitled to the same) having consented to this postponement.

(When an excess has been abandoned or the defendant has paid money into court, which has not been accepted, add, "Being in full discharge of his cause of action set forth in the claim.")

*Add, "On verdict of jury," if the cause was tried by the jury.

333. REQUEST OF CREDITOR FOR DISCHARGE OF PRISONER.

(Title of Court and Style of Cause.)

I, the undersigned A..... B....., the plaintiff (or the beneficial plaintiff) in this action, request that the defendant, if still in custody, may be discharged (or, if not in custody that he be not arrested).

A..... B.....

To the clerk (or bailiff) of the said court.

(See pp. 425-429.)

334. FORM OF WARRANT OF COMMITMENT FOR DISOBEDIENCE OF
ORDER, OR FOR NEGLECT OR REFUSAL REFERRED TO
IN SECTION 247.

(Title of Court and Style of Cause.)

Whereas, upon the application of the plaintiff, a summons was duly issued from and out of this court, which was duly served upon the defendant, requiring him to appear at _____, in the said county, on the day of _____, A.D. 18____, to answer such things as were therein named and to be examined upon oath, touching his estate and effects and the manner and circumstances under which he contracted the debt (or incurred the damages or liability) which formed the subject of this action, and as to the means and expectation he then had, and as to the property and means he still has of discharging the debt (or damage or liability), and as to the disposal he has made of any property.

And whereas the said defendant did not attend as required by the said summons, or allege a sufficient reason for not attending; (or attended and refused to be sworn, or would not make answer to such questions as were put to him, and which, in the opinion of the judge, were proper questions), or because it appeared to the judge that the defendant obtained credit from the plaintiff (or incurred the debt or liability) under false pretences, or by means of fraud or breach of trust; or had made, or caused to be made, any gift, delivery, or transfer of his property (or had removed or concealed the same with intent to defraud his creditors, or any of them); or it appeared to the judge that the defendant had, when or since the judgment was obtained against him in this cause, sufficient means and ability to pay the debt (or damages or costs) recovered against him, either altogether, or by instalments which the court in which the judgment was obtained had ordered to be paid, without depriving himself or his family of the means of living, and that he has wilfully refused or neglected to pay the same as ordered).

And whereas by an order bearing date the _____ day of _____, A.D. 18____, it was ordered that the defendant should be committed to the common gaol of the County of _____, for contempt of this court, for the term of _____ days.

(Conclude as in forms 162, 162a.)

(See Sec. 193, p. 348.)

335. EXECUTION ON A JUDGMENT IN FAVOR OF A THIRD PARTY,
WHERE, IN GARNISHEE PROCEEDINGS, THE THIRD PARTY
CLAIMED THE AMOUNT OF THE DEBT SOUGHT TO
BE ATTACHED, AND THE CLAIM WAS
DECIDED IN FAVOR OF THE
THIRD PARTY WITH
COSTS.

(Title of Court and Style of Cause.)

Whereas the primary creditor at a sitting of this court on the day of _____, A.D. 18____, obtained a judgment against the primary debtor for debt (or money demand), over which the court had jurisdiction, due and owing from the primary debtor to the primary creditor, and the sum of \$ _____ for a debt was claimed due and owing by the garnishee to the primary debtor, and the primary creditor took proceedings to attach the same to satisfy his claim against the primary debtor (or to the extent of \$ _____, part thereof, or as the case may be), but the

said H..... G....., the other party to the said proceedings, claimed and was adjudged to be entitled thereto by assignment thereof (*or otherwise as the case may be; here state how*), and the judge gave effect to the last-mentioned claim, and ordered the garnishee to pay the said debt so sought to be attached into court for the said H..... G..... forthwith (*or as the case may be; or ordered the same to be paid by the following instalments, viz.:—here state the instalments*), and because the garnishee set up a defence to the said claim which he knew, or ought to have known, was untenable, the judge ordered the sum of \$, being part of the costs of the said H..... G..... and so wrongfully occasioned by the said garnishee, to be paid by the garnishee, and ordered the sum of \$, the residue of the costs of the said H..... G..... on being obliged to prove his claim and right to the said money, to be paid by the primary creditor, and none of the said moneys being paid, but remaining wholly unsatisfied (*or the sum of \$ remaining unsatisfied*);

You are hereby required to levy of the goods and chattels of the said garnishee (not exempt from execution) the sum of \$ for debt due the primary debtor (and \$ for part of the said costs, if costs were ordered against the garnishee), and to levy of the goods and chattels of the said primary creditor, in the said County (not exempt from execution), the sum of \$ for the said costs of the said H..... G..... in so proving his said right (*or for the residue of the costs of the said H..... G..... in so establishing his right to the said debt, or the sum of \$ for the costs of the said H..... G..... in establishing his right to the said debt*), so due and owing to the primary debtor by the garnishee, together with your lawful fees.

(*Proceed as in form 132, and conclude.*)

(See R.S.O. c. 154, Schedule.)

336. STATEMENT OF CLAIM OF LIEN UNDER THE WOODMAN'S LIEN FOR WAGES ACT, SECTIONS 6 AND 7.

A. B. (name of claimant) of (state residence of claimant), (if made as assignee then say, as assignee of, giving name and address of assignor) under "The Woodman's Lien For Wages Act" claims a lien upon certain logs or timber of (*here state the name and residence of the owner of the logs or timber upon which the lien is claimed, if known*) upon the logs or timber composed of (*state the kinds of logs and timber made as, pine saw logs, cedar or posts, or railway ties, shingle bolts or staves, etc., also where situated at time of filing statement*) in respect of the following work, that is to say, (*here give a short description of the work done for which the lien is claimed*) which work was done for (*here state the name and residence of the person upon whose credit the work was done*) between the day of and the day of at (per month or day, as the case may be).

The amount claimed as due (*or to become due is the sum of* (when credit has been given, the said work was done on credit and the period of credit will expire on the day of A.D. 18 .

(Signature of claimant.)

337. AFFIDAVIT TO BE ATTACHED TO STATEMENT OF CLAIM.

I _____, make oath and say that I have read (or have heard read) the foregoing statement of claim and I say the facts therein set forth are, to the best of my knowledge and belief, true, and the amount claimed to be due to me in respect of my lien is the just and true amount owing to me after giving credit for all sums of money, goods or merchandise, to which the said (naming the debtor) is entitled to credit as against me.

Sworn before me at _____ in
the district of _____
this _____ day of _____ A.D. 18 ____

A Commissioner.

(See R.S.O. c. 154, s. 16.)

338. AFFIDAVIT FOR ATTACHMENT UNDER THE WOODMAN'S LIEN FOR WAGES ACT.

(Court and Style of Cause.)

I, A.B. (the claimant) of the _____ of _____ in the _____
(district or county) of _____ make oath and say:

1. That C. D. *(the defendant)* of *(or late of)* _____ is justly and truly indebted to me in the sum of _____ *(the amount stated must not be less than \$10, nor more than \$200)* for work done for the said C.D. in respect of the logs and timber hereinafter described, that is to say *(here describe particularly the logs and timber for which the attachment is sought)* as set forth in the statement of claim, a copy of which is hereunto annexed.

2. That the said statement of claim with the affidavit attached thereto duly sworn as required by The Workman's Lien For Wages Act, were filed by me in the office of the clerk (or deputy clerk) of the district court of _____ on the _____ day of _____ A.D. 18____, in accordance with the provisions of said Act.

3. That I have good reason to believe and do believe that the said logs or timbers are about to be removed out of the Province of Ontario (or that the said C.D. has absconded from the province with intent to defraud or defeat his creditors, or that the said saw logs or timbers are about to be cut into lumber of other timber, so that the same cannot be identified) and that I am in danger of losing my said claim if an attachment do not issue.

Sworn, etc.

N.B.—This affidavit must be corroborated by other affidavits as to the facts stated in paragraph 3, and a copy of the statement of claim (Form 337) and of the affidavit (Form 338) must be produced and filed with it in the office of the proper Division Court.

(See R.S.O. c. 154, s. 16.)

339. ATTACHMENT UNDER THE WOODMAN'S LIEN FOR WAGES ACT.

To G..... F....., Bailiff of the Division Court in the District of :—

You are hereby commanded to attach, seize, take and safely keep the logs and timber of C..... D....., of , composed of (*here describe the logs or timber to be attached*) situated at , or a sufficient portion thereof to secure A..... B..... (*the creditor*) for the sum of (*here state the amount sworn to be due*), together with the costs of his suit and of the proceedings to enforce his lien thereupon, and to return this warrant to the clerk of the Division Court in the District aforesaid; and herein fail not.

Witness my hand and seal this day of one thousand nine hundred

X..... Y.....
Clerk.

N.B.—The warrant must be issued under the hand and seal of the clerk, not under the seal of the court, though the clerk could probably adopt the court seal as his own: see notes to section 257, *ante* p. 442. The warrant must be directed to the Bailiff of the Division Court. It cannot be executed by a constable as in the case of an attachment under the Division Courts Act.

(See Section 249.)

340. WARRANT OF ATTACHMENT.

(*Title of Court and Style of Cause.*)

{ Seal. }

To Ready Fastner, Bailiff of the said court, and to all constables and other peace officers of the said county, and to the gaoler of the common gaol of the same county at

Whereas, by an order bearing date the day of , A.D. 18 , it was ordered that the defendant, C..... D....., should stand committed to prison for contempt of this court;

These are therefore to require you, the said bailiff, constable, or peace officers, or any or either of you , to arrest and apprehend the defendant C..... D....., and him safely convey and deliver to the said gaoler at , and you, the said gaoler, to receive and keep the defendant C..... D..... in your custody in the said gaol until the further order of this court.

Given under the seal of the court, etc.

E..... F.....,
Clerk of the Court.

(Sections 251, 252.)

341. NOTICE OF APPLICATION FOR DISCHARGE FROM CUSTODY.

(Title of Court and Style of Cause.)

Take notice that I intend, on the _____ day of _____, 18____, to apply to this court (or to the judge of this court) at the sittings of the said court to be held at _____ (or at the judge's chambers at _____), in the said County of _____, at the hour of _____ o'clock in the noon, or so soon thereafter as the application can be heard, to discharge me from custody, I being desirous of clearing my contempt.

Dated this _____ day of _____, A.D. 189____, C..... D.....,

To A..... B....., Defendant.
Plaintiff.

(See pp. 435, 436.)

342. ORDER OF DISCHARGE FROM CUSTODY.

(Title of Court and Style of Cause.)

{ Seal. }

Upon application made this _____ day of _____ by _____ for the defendant, who was committed to prison for contempt, by order of this court, dated the _____ day of _____, 18____, and upon reading the affidavit of the defendant, filed the _____ day of _____, 18____, showing that he is desirous of clearing his contempt, and upon hearing the plaintiff (or if no one appears for the plaintiff, then upon being satisfied that notice of this application has been duly served upon the plaintiff), it is ordered that the said defendant remaining in your custody for the said cause and no other, he be discharged from such custody as to the said contempt, but not as to the costs of the said contempt.

Given under the seal of this court this _____ day of _____, 18____.

E..... F.....,
Clerk of the Court.

To the Gaoler of the common gaol of the said county at _____.

(See. 82, pp. 127, 129.)

343. AFFIDAVIT FOR CERTIORARI.

In the High Court of Justice, _____ Division.
In the matter of a plaint in the _____ Division Court, in the County of _____, wherein _____ is plaintiff, and _____ is defendant.

I, A..... B....., of the _____ of _____, in the County of _____, in the Province of Ontario, make oath and say:—

1. That on the _____ day of _____, last past, I was served with a summons and particulars of claim thereto attached (or indorsed), in a suit entered in the _____ Division Court for the (said) County of _____, in which suit _____ is plaintiff, and A..... B..... is defendant.

2. That the annexed papers, marked respectively "A" and "B," are true copies (or the copies) of the said summons and particulars of claim so served on me.

3. That I am the said A..... B..... mentioned and described as the defendant in the said suit in the said Division Court, and in the said summons so served on me as aforesaid.

4. That this action is brought against me for the purpose of recovering the sum of \$ for (here set out particularly the cause of action sued for, if the particulars of claim attached to or indorsed on the summons do not do so).

5. That I am advised and verily believe, that several difficult questions of law are likely to arise on the hearing of the said cause, and, among others, the following:— (Here state, distinctly and fully, the questions of law likely to arise; also state in the affidavit all facts tending to show that such questions are likely to arise).

6. That I have been advised and verily believe, that I have a good defence to the said action so brought against me on the merits.

7. That the application for an order of *certiorari* to be made herein is not made for the purpose of delaying the fair or speedy trial of the said action, or in any way to prejudice or delay the said in the prosecution of any cause of action he may have against me in any suit, nor in the recovery of any sum of money he may be found entitled to in the said suit; that the said application will be made *bona fide*, and for the sole purpose of the better determining my liability on the said alleged cause of action, and with no other object or purpose whatsoever.

Sworn, etc.

(Sec. 82, p. 127.)

344. AFFIDAVIT FOR CERTIORARI BY PLAINTIFF.

In the High Court of Justice, Division.

In the matter of a plaint in the Division Court, in the County of , wherein is plaintiff, and is defendant.
I, , of the City of , in the County of , make oath and say:—

1. I am the above-named plaintiff.

2. This action was commenced by me on the day of , 18 , and the particulars of my claim therein, as annexed to the summons issued out of the said court, are as follows:—

3. The defendant duly filed a notice disputing my said claim.

4. The action came on for trial on the day of , 18 , before the judge of the said court, and during the course of the trial the defendant, by his counsel, asserted that the devise under which I claimed the lands and premises in respect of the trespass to which by the defendant this action was brought was invalid, and that the defendant, as heir-at-law of A..... B....., the testator, was entitled to the lands and premises in question herein. The learned judge of said court thereupon decided that he had no jurisdiction to proceed with the trial of the said action, and the same was adjourned to enable me to move to transfer the same into this court, pursuant to the statute in that behalf.

Sworn before me at the of }
in the County of , this }
day of , A.D. 18 . }

A Commissioner, etc.

This affidavit is filed on behalf of the said A..... B.....

(Sec. 71, p. 67.)

345. AFFIDAVIT FOR PROHIBITION.

In the High Court of Justice, Division.

In the matter of a plaint in the Division Court, in the County
of , wherein is plaintiff, and is defendant.I, A. B., of the of , in the County of , and
Province of Ontario, make oath and say:—1. That, on the day of , A.D. 18 , I was served with
the annexed copy of summons and particulars of demand thereto attached,
marked "A."2. That I am the defendant (or one of the defendants) in the suit
mentioned in the said summons of against myself (if others, naming
them also), in the Division Court for the (said) County of .3. That I attended at the sittings of the said Division Court, held on
the day of , A.D. 18 , and did there and then (through C.
D., my counsel or agent, as the case may be) object to the jurisdiction
of the said Division Court to entertain the said suit, inasmuch as I
claimed to justify the said alleged trespass by right and title to the said
close at the time when the said trespass was alleged to have been com-
mitted (or here set out any other ground of objection which the deponent
made, according to the circumstances of the case).4. That I did there and then offer to prove, before the judge of the
said court, that I did *bona fide* claim the right and title to the said close,
and that the same was my close, soil, and freehold (or whatever other fact
or facts were relied on before the judge as showing a want of jurisdiction, or
what the defendant otherwise offered to prove).5. That the said close in which the said supposed trespass was
committed is part of lot No. , in the concession of the Township
of , in the County of .6. That I did, at the time when the said supposed trespass was
committed, *bona fide* claim, and from thence continually hereto have
bona fide claimed, the soil or freehold of the said land by virtue of a
conveyance (or as the case may be) thereof heretofore made to me by one
G. H., bearing date the day of , A.D. 18 (or in such
other way as the defendant claims title to the land).7. That the said close is part and parcel of the said land so conveyed
(or as the case may be) as aforesaid, and that the said , the
plaintiff in said Division Court suit, claims the said close adversely to
me, and contends, as I believe, that the said close belongs to him, but
which I say is not the case.8. That the said judge, notwithstanding my first objection, and
notwithstanding my said offer to prove my said title as aforesaid, did
proceed to hear and determine the said cause, and gave judgment against
me for \$ damages, together with costs (or as the case may be), on
the said day of , A.D. 18 , payable in days (or
forthwith, or otherwise, as the case may be).

9. That I have not paid the said damages or costs.

10. That execution has (or has not) issued against me therefor.

Sworn, etc.

ADDITIONAL FORMS—MANDAMUS, CERTIORARI, PROHIBITION. 719

(See. 71, pp. 70-72.)

346. AFFIDAVIT ON MOTION FOR MANDAMUS.

(Proceed as in form 346, to the end of paragraph 2.)

3. The said action came on for trial on the day of , A.D. 18 , and during the course of the said trial the defendant by his counsel objected to the jurisdiction of the said court upon the ground that the cause of action did not arise within the limits of the said Division Court, and that the defendant did not reside or carry on business therein.

4. It was shown in evidence on the said trial, and the fact is, that the goods for the price of which this action is brought were ordered by the defendant of the plaintiff by a telegram sent by the defendant from the City of Hamilton, in the County of Wentworth, to the plaintiff, at Severn River, in the District of Algoma, as follows:—

"Send one ton most white fish, if good, dressed, at 5c. Ans."; to which the plaintiff replied:—

"Fish are shipped to-day in eight boxes."

5. It was further shown in evidence that the fish arrived at Hamilton, but the defendant contends that the same were in such a state as to be of no value, and refused to pay therefor.

6. The learned judge acceded to the objection of the defendant, and refused to further proceed with the trial of the said action in the said court.

7. I declined to move for an order for the transfer of the said action to the Division Court within the limits of which the defendant resides.

8. The learned judge thereupon ordered me to pay the costs of the said action.

Sworn, etc.

This affidavit is filed on behalf of the said A..... B.....

(pp. 68, 72, 127.)

347. NOTICE OF MOTION FOR MANDAMUS, CERTIORARI, OR PROHIBITION.

(Court and Cause as in 363.)

Take notice that a motion will be made on behalf of A..... B....., the above-named plaintiff (or C..... D....., the above-named defendant), before the presiding Judge in Chambers at Osgoode Hall, in the City of Toronto, on Monday (or Friday), the day of , A.D. 18 , at the hour of ten o'clock in the forenoon, or so soon thereafter as the motion can be heard, for an order that a writ of mandamus do issue out of this court directed to E..... F....., judge of the County Court of the County of , *ex officio* the judge of the Division Court in the County of , commanding him to hear and determine the plaint now pending in the said court between the said A..... B..... and C..... D.....

(Or for an order that the judge of the County Court of the County of , *ex officio* the judge of the Division Court, in the County of , do forthwith send to the registrar of the Division of the High Court of Justice at Toronto the proceedings and papers in a certain action in the said Division Court, between the said A..... B....., plaintiff, and C..... D....., defendant, with all things touching the same, that the said court may further cause to be done thereupon what it shall see fit to be done, and for an order staying all further proceedings in the said Division Court until further order of the said High Court or a judge.)

(Or for an order that the said A..... B..... be prohibited from further proceeding with the said plaint in the Division Court in the

720 ADDITIONAL FORMS—CERTIORARI, PROHIBITION.

County of _____, wherein the said A..... B..... is plaintiff and the said C..... D..... is defendant, or for such further or other order as to the said judge may seem meet.)

And take notice that in support of such application will be read the certified copy of the entries in the procedure book of the said Division Court, duly certified by the clerk thereof, pursuant to The Division Courts Act, the affidavit of _____ this day filed and the exhibits therein referred to.

Dated the _____ day of _____, A.D. 18 . X..... Y.....,
Solicitor for the said

To the Judge of the said court,
and

To

and

To the above-named A..... B..... or C..... D.....

(Sec. 82, p. 127.)

348. ORDER FOR CERTIORARI.

In the High Court of Justice, } Division.
The Hon. Mr. Justice }
in Chambers } , the day of , 18 .

In the matter of a plaint in the _____ Division Court, in the County of _____, wherein A..... B..... is plaintiff, and C..... D..... is defendant.

Upon the application of the above-named _____, and upon reading the affidavit of _____, and a certified copy of the entries in the procedure book in the said Division Court, duly certified by the clerk thereof, pursuant to The Division Courts Act, and upon hearing counsel for the said A..... B..... and C..... D.....;

It is ordered that the judge of the County Court of the County of _____, *ex-officio* judge of the _____ Division Court, in the County of _____, do forthwith send to the registrar of the _____ Division of the High Court of Justice at Toronto the proceedings and papers in a certain action in the said Division Court between A..... B....., plaintiff, and C..... D....., defendant, with all things touching the same, together with this order, that this court may further order to be done thereupon what it shall see fit to be done, and no further proceedings are to be taken in the said court, in said action, until further order of this court or a judge.

(Sec. 71, pp. 67-69.)

349. ORDER FOR PROHIBITION.

(Court and Cause as in 348.)

Upon the application of the above-named C..... D....., and upon reading, etc., and it appearing that the said A..... B..... has entered an action against the said C..... D..... in the _____ Division Court, in the County of _____, and the said court has no jurisdiction to hear and determine the said action by reason that (*state facts showing want of jurisdiction*);

It is ordered that the said A..... B..... be and he is hereby prohibited from further proceeding in the said action in the said court.

BOUNDARIES OF DIVISION COURTS.

DIVISION COURTS AND THE LIMITS OF THE RESPECTIVE DIVISIONS IN THE PROVINCE OF ONTARIO.

DISTRICT OF ALGOMA.

1.—Bounded west by Thunder Bay District, 85th parallel of west longitude, and east by Barr River, including all the islands in front.

2.—Bounded west by Barr River, and east by the westerly boundary of the townships of Thessalon River, Kirkwood, Bridgeland and Houghton, and by said boundary line of the last three named townships, produced northerly.

3.—Bounded west by the westerly boundary of the townships of Thessalon River, Kirkwood, Bridgeland and Houghton, and the boundary line of the last named three townships, produced northerly, and on the east by the eastern boundary of the Township of Sprague, produced northerly.

4.—Bounded on the west by the boundary line between the townships of Sprague and Lewis, produced north to the northern boundary of the District of Algoma, thence along the northern boundary of the said district, thence south along the eastern boundary to the waters of Lake Huron, thence westerly along the southern boundary of the District of Algoma, to a point opposite the boundary line between the townships of Sprague and Long, thence northerly to said last-mentioned boundary line, thence easterly along the said southern boundary line of the Township of Sprague to the place of beginning, except the territory comprised in the limits of Division No. 5.

5.—The Townships of Rayside, Balfour, Snyder, Creighton, Fairbank, Dowling, Lanark, Morgan, Lumsden, Carscaden, Cartier, Ermatinger, Hart, Hess, Monerief and Craig, and all those portions of Algoma lying adjacent to the main line of the Canadian Pacific Railway, south of said railway and west of the westerly boundary of the Township of Monerief to the westerly boundary of the Provincial Judicial District of Algoma, and all that portion of the said district lying north of the said C. P. R. and west of the said westerly boundary of the said Township of Monerief. And that such portions of the said territory above described as has been and is a portion of the other Division Court divisions in said district shall be separated from such divisions; and that the said divisions are altered accordingly.

6.—Consisting of St. Joseph's Island.

COUNTY OF BRANT.

1.—The City of Brantford and that part of the Township of Brantford not included in the other divisions hereinafter described. The Townships of Onondaga and Tuscarora, and that part of the Township of Brantford lying south of the main road from Brantford to Hamilton and east of Fairchild's Creek.

2.—The Town of Paris and the part of South Dumfries west of the line between lots 18 and 19, and that part of the first concession of the Township of Brantford lying west of a continuation of the last-mentioned line.

3.—The remainder of the Township of South Dumfries and of the first concession of the Township of Brantford.

4.—The ten northern concessions of the Township of Burford, and that part of the 2nd, 3rd, 4th and 5th concessions of the Township of Brantford, west of the line between lots Nos. 10 and 11, and that portion of the Kerr tract west of a continuation of the last-mentioned line.

5.—The Township of Oakland, the four southern concessions of the Township of Burford, and lots Nos. 1 to 5, inclusive, in the ranges east and west of the Mount Pleasant Road, in the Township of Brantford, adjoining the Township of Oakland.

COUNTY OF BRUCE.

1.—The Town of Walkerton and the Township of Carriek, and all the Township of Brant, south of the line between the 11th and 12th concessions, in lots up to No. 25, and south of the line between concessions 9 and 10, in lots 26 to 34, inclusive.

2.—The Village of Teeswater, all the Township of Culross, and that part of the Township of Greenock lying south of the line between the 11th and 12th concessions.

3.—The Town of Kincardine and that part of the Township of Kincardine lying south of a line drawn between the 9th and 10th concessions.

4.—The Village of Paisley and that part of the Township of Brant lying north of a line drawn between the 11th and 12th concessions of the Township of Brant.

That part of the Township of Elderslie, except lots 16 to 36, both inclusive, in concessions 12, 13 and 14 of said Township, except so much of said Township as lies south of concession 12 and east of lot 25, and so much of the Township of Brant as lies north and east of lot 25.

All the Township of Greenock lying north of a line drawn between concessions 11 and 12 of said Township.

Lots 26 to 35, both inclusive, in the 8th, 9th, 10th, 11th, 12th, 13th and 14th concessions of the Township of Bruce; and that part of the Township of Saugeen lying east of a line between lots 28 and 29, and south of the production of the town line between the Townships of Arran and Elderslie to the Saugeen River.

5.—All Saugeen Township not included in No. 4, all that part of the Township of Arran lying west of a line between lots 10 and 11 and north of Arran Lake and the outlet of said lake, and that part of the Township of Amabel lying north of the 10th concession and west of the eastern boundary of concession C of Amabel, and the Villages of Port Elgin and Southampton.

6.—The Village of Tiverton, and that portion of Kincardine Township north of a line drawn between concessions 9 and 10 in said Township, and all the Township of Bruce, except that part included in No. 4.

7.—That part of the Township of Elderslie not included in No. 4, and that part of Arran Township not included in No. 5, that part of the Township of Amabel which lies south of the 8th concession and east of concession lettered C in said Township, and the said Village of Tara.

8.—The Village of Wiarton, the Township of Albemarle, and that part of the Township of Amabel lying north of a line between the 9th and 10th concessions.

9.—All the Township of Huron.

10.—All the Townships of Eastnor, Lindsay and St. Edmunds.

11.—The Village of Lucknow; all of the Township of Kinloss.

12.—The Village of Chesley; that part of the Township of Elderslie lying east of the 25th side line and south of 12th concession of the said Township; all that part of the Township of Brant lying east of the 25th side line and north of the 9th concession of said Township.

COUNTY OF CARLETON.

1.—Comprising all the City of Ottawa, and the Township of Gloucester, to lot 15, inclusive, Rideau front and concessions 1 to 6, inclusive, Ottawa front and the islands in the Ottawa River opposite thereto.

2.—All the Township of Goulbourn; the 8th, 9th and 10th concessions of the Township of Marlborough; all that portion of the Township of Nepean south of the River Goodwood; and the 4th, 5th and 6th concessions thereof north of the same river to the boundary line between lots 20 and 21 in the last mentioned concessions.

3.—All the Township of Huntley, and all the Township of March, except lots 1 to 5, inclusive, in concessions 1, 2, 3 and 4 thereof.

4.—All the Townships of Fitzroy and Torbolton.

5.—All the Township of North Gower; Long Island in the Rideau River and 1st, 2nd, 3rd, 4th, 5th, 6th and 7th concessions of Marlborough.

6.—All the Township of Osgoode; the 6th, 7th and 8th concessions Ottawa front and from lots 16 to 30, inclusive, of the Rideau front of the Township of Gloucester.

7.—All the Township of Nepean, except the City of Ottawa, and the part of the said Township lying south of the River Goodwood and concessions 4, 5 and 6 north of said River Goodwood to the boundary line between lots 20 and 21 in the said last mentioned concessions, and including also lots 1 to 5, inclusive, in concessions 1, 2, 3 and 4 in Township of March.

COUNTY OF DUFFERIN.

1.—The Town of Orangeville, the Township of East Garafraxa, and all that portion of the Township of Amaranth lying south of the southerly boundary of lot No. 26, in each concession of the Township of Amaranth.

2.—The Village of Shelburne, the Township of Melancthon, and all that portion of the Township of Amaranth lying north of the southerly boundary of lot No. 26, in each concession of the Township of Amaranth.

3.—The Township of Mulmur.

4.—The Township of Mono.

5.—The Township of East Luther.

COUNTY OF ELGIN.

- 1.—The Townships of Bayham, Malahide and South Dorchester.
- 2.—The Townships of Southwold and Yarmouth (except the City of St. Thomas).
- 3.—The City of St. Thomas.
- 4.—The Townships of Aldborough and Dunwich.

COUNTY OF ESSEX.

- 1.—Town of Sandwich and Township of Sandwich West.
- 2.—Town of Amherstburg and Townships of Alden and Anderdon.
- 3.—The Village of Kingsville, and all that part of the Township of Gosfield not included in Division No. 8.
- 4.—The Township of Colchester South, and all that part of Colchester North, south of the 9th concession, exclusive of the said concession and the lots on both sides of Malden street.
- 5.—Township of Mersea and Village of Leamington.
- 6.—The Township of Rochester, the Village of Belle River, the first concession of the Township of Maidstone, and all north of the Middle Road in said Township of Maidstone.
- 7.—Town of Windsor, the Town of Walkerville, and all part of Sandwich East, north of the Talbot Street range.
- 8.—The Town of Essex, all that part of the Township of Maidstone lying west of the first concession and south of the Middle Road; so much of Sandwich East as is south of Talbot street, including the lots on both sides of said street to Nos. 306 and 307; all of Colchester north of the 9th concession, including said concession and lots on both sides of Malden street, and all that part of Gosfield lying north of concession 6, and extending as far east from the limits between Gosfield and Colchester as lot No. 12, including such lot in each concession north of concession 6, inclusive.
- 9.—The Townships of Tilbury West and Tilbury North.

[NOTE.—A resident bailiff, appointed on Pelee Island, is authorized to serve and execute process of the Second, Third and Fifth Division Courts of Essex, on the Island.]

COUNTY OF FRONTENAC.

1. City of Kingston, Township of Garden Island, Wolfe Island, Howe Island, and part of the Township of Pittsburg.
- 2.—Cataraqui, comprising the Township of Kingston and the Village of Portsmouth.
- 3.—Loughboro', comprising the Townships of Loughboro' and Bedford.
- 4.—Verona, comprising the Townships of Portland and Hinchinbrooke.
- 5.—Sudbury, comprising the Township of Storrington and part of the Township of Pittsburg.
- 6.—Comprising the Townships of Kennebec, Olden, Oso, Barrie, Clarendon, Palmerston, Miller, North Canoto and South Canoto.

COUNTY OF GREY.

1.—The Town of Owen Sound, the Village of Brook, and the Townships of Derby, Keppel, Sarawak and Sydenham.

2.—The Town of Durham, the Township of Egremont, and those portions of the Townships of Bentinck, Normanby and Glenelg as follows:—That part of the Township of Bentinck lying east of the line between lots 30 and 31 in the 1st, 2nd and 3rd concessions south of the Durham Road, and in concessions 1, 2 and 3 north of the Durham Road, and east of the line between lots 15 and 16 in concessions 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14 and 15 thereof. That part of the Township of Normanby lying east of the line between lots 20 and 21, in the 4th, 5th, 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th and 18th concessions, and all the Township of Glenelg, excepting that portion lying east of the line between lots 10 and 11 in the 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th and 15th concessions thereof.

3.—The Town of Meaford, the Township of St. Vincent, and that part of the Township of Euphrasia lying west of the line between the 6th and 7th concessions and north of the line between lots 15 and 16.

4.—The Township of Collingwood and the east half of the Township of Euphrasia, excepting that part thereof lying west of the line between the 4th and 5th concessions, and south of the lots between lots 12 and 13, and east half of the Township of Osprey.

5.—The Township of Proton, the west half of the Township of Osprey, and those parts of the Township of Artemesia, consisting of the ranges of lots lying parallel to the Toronto and Sydenham Road, and south of the line between lots 130 and 131, and concessions 1, 2 and 3 south of the Durham Road, and 1, 2, 3, 4, 5 and 6 north of the said Durham Road, and those portions of concessions 7, 8 and 9 lying east of the ranges of lots parallel with the Toronto and Sydenham Road, and those portions of concessions 10, 11, 12, 13 and 14 lying east of the line between lots 30 and 31.

6.—The Township of Sullivan and the Township of Holland, excepting those portions of concessions 9, 10, 11 and 12 lying south of the line between lots 15 and 16, and those portions of concessions 7 and 8 west of the ranges of lots lying parallel with the Toronto and Sydenham Road; and the ranges of lots lying parallel with the Toronto and Sydenham Road; and south of the line between lots 50 and 51.

7.—All the lots from 1 to 30, inclusive, in the three concessions south, and the three concessions north of the Durham Road, in the said Township of Bentinck; and all the lots from 1 to 15 inclusive, in the 12th concession, from the 4th to the 15th concessions inclusive, of the said Township of Bentinck; and all the lots from 1 to 20 inclusive, in all the concessions from 4 to 18 inclusive, in the Township of Normanby aforesaid.

8.—All the lots from 51 to 130, inclusive, in all the concessions from parallel to (and being north-east and south-west) of the Toronto and Sydenham Road, in the Township of Artemesia, Glenelg and Holland aforesaid; all lots to the westward of the dividing line between lots 30 and 31, in all the concessions from 10 to 14 inclusive, and all the lots from 1 to 5 in the 7th, 8th and 9th concessions, inclusive, which lie to the south-west of the 3rd concession, south-west of the said Toronto and said Sydenham Road, in the said Township of Artemesia; all the lots from 1 to 12, inclusive, in concessions 5 and 6, and the lots from 1 to 15, inclusive, in the concessions from 7 to 12, inclusive, in the Township of Euphrasia; all lots south of the allowance for road between lots 15 and 16 in the 9th, 10th, 11th and 12th concessions, and from lots 25 to 30 inclusive, in the 7th concession, and lots 28, 29 and 30 in the 8th conces-

sion of the said Township of Holland; and all the lots lying east of the allowance for road between lots 10 and 11, in all the concessions from 7 to 15 inclusive, in the said Township of Glenelg.

COUNTY OF HALDIMAND.

1.—All the Townships of Seneca except the first and second concessions, the Young tract, and the property of the late Richard Martin, and the late Robert Weir; all the Township of Oneida, except the first range north of the Cayuga line; the Dennis tract and the lots southerly of said tract.

2. The whole of the Township of North Cayuga, except that portion thereof lying north-east of side line between lots 12 and 13; the first and second concessions of the Township of Seneca, except that portion thereof lying north-east of the side line between lots 12 and 13; the Young tract and the lands of the late Robert Weir and the late Richard Martin, Esquires; the first range of Oneida and north of Cayuga line; also the Dennis tract and River lots lying south.

3. The Townships of Moulton, Sherbrooke and Dunn, including the Village of Dunnville.

4.—The Townships of South Cayuga and Rainham.

5.—The Township of Canboro', and those portions of North Cayuga and Seneca not included in the other divisions.

6.—The Township of Walpole.

COUNTY OF HALIBURTON.

1.—The Townships of Glamorgan and Snowden, except that portion of both included in the third division, and all of the Townships of Snowden, Lutterworth, Minden, Anson, Stanhope, Hindon, Sherbourne and McClintock.

2.—The Townships of Dysart, Guilford, Havelock, Livingstone, Lawrence, Eyre, Harburn, Dudley, Harcourt, Bruton, Clyde and Nightingale and that portion of Monmouth not included in the third Division.

3. The Township of Cardiff, the Township of Monmouth (except lots 1 to 19 inclusive (in the 13th, 14th, 15th, 16th and 17th concessions; the south twelve concessions of the Township of Glamorgan, and from lot 21 inclusive, to the eastern boundary in the south six concessions of Snowden.

COUNTY OF HALTON.

1.—All the territory comprised in the new survey of the Township of Trafalgar, and the first ten lots in concessions 1, 2, 3, 4, 5 and 6 in the Township of Esquesing, and the first five lots in concessions 7, 8, 9, 10 and 11 in said township.

2.—That part of the Township of Trafalgar known as the Old Survey.

3.—All the rest of the territory comprised in concessions 8, 9, 10 and 11 in the Township of Esquesing not comprised in the first division.

4.—All the rest of the territory comprised in concessions 1, 2, 3, 4, 5 and 6 in the Township of Esquesing.

5.—The Township of Nassagaweya.

6.—The Township of Nelson.

COUNTY OF HASTINGS.

1.—To comprise the City of Belleville and the Township of Thurlow; also all that portion of the Township of Sidney lying south of the 8th concession, and east of the line between lots 18 and 19.

2.—(Order made discontinuing this court, from 1st of March, 1897. The territory to be divided amongst the 1st, 5th and 9th courts as given under these respective divisions.)

3.—The Township of Tyendinaga, except that part called Deseronto.

4.—The Township of Hungerford.

5.—All that part of the Township of Sidney which lies to the north of the 8th concession, and to the east of lot No. 6 in each concession north of the 8th concession, and all that part of the Township of Rawdon, which lies to the south of the 9th concession, and that part of the Township of Huntingdon south of the 6th concession; also Block A. and lots 1, 2, 3, 4, 5 and 6 in the 8th and 9th concessions of the Township of Sidney, (heretofore forming part of the second division) together with all that portion of the Township of Sidney lying north of the 7th concession, and east of the line between lots 6 and 7.

6.—The Townships of Madoc, Tudor, Limerick, excepting that part lying north of the 10th concession, and also that part lying west of lot 25 in the different concessions south of the 11th concession of said township, and including all that part of the Township of Huntingdon north of the 6th concession of said township, the townships of Elzevir, Grims-thorpe, Cashel, excepting that part of Cashel lying north of the 10th concession of the said Township.

7. The Village of Deseronto.

9. The Town of Trenton, and all that part of the Township of Sidney which lies to the west of lot 7 in each of the concessions of the township, including Mill Island. Also, all of said Township of Sidney lying south of the 8th concession and west of the line between 18 and 19, and east of the line between lots 6 and 7.

10. The Townships of Marmora, Lake, and all that part of the Township of Rawdon which lies to the north of the 8th concession.

11. The Townships of Herschell, Montegale, Carlow, Bangor, Wicklow and McClure.

12.—The Townships of Wollaston, Faraday, Dungannon, Mayo, and all that part of the Township of Cashel lying north of the 10th concession of said township, and all those parts of the Township of Limerick lying north of the 10th concession, and west of lot No. 25 in the several concessions of the said Township of Limerick.

COUNTY OF HURON.

1.—Comprising that part of the Township of Goderich to the north of the Cut Line and the Huron Road until the same meets the road allowance between the 13th and 14th concessions; then back along the Huron Road to its junction with the Cut Line; then west by the road allowance between concessions 11 and 12 to the River Maitland; then along the River Maitland to Goderich, together with the Township of Colborne.

2.—Comprising the Township of McKillop, the Town of Seaforth, and all that portion of the Township of Tuckersmith not included in the third division, south of the blind line between the 7th and 8th concessions of the said Township of Hullett.

3.—Comprising the Township of Hullett; that part of the Township of Goderich not included in Nos. 1 and 7; 1st, 2nd, 3rd and 4th concessions

Township of Stanley; 1st and 2nd concession Township of Tuckersmith, L.R.S., north of lot 15, and that portion west of side road between lots 25 and 26, H.R.S., and Town of Clinton.

4.—Comprising the Township of Grey; all of the Township of Morris east of side road between lots numbers 10 and 11 (which is not included in No. 12), and the Village of Brussels.

5.—Comprising the Township of Usborne and Stephen, and the Village of Exeter.

6.—Comprising the Townships of Ashfield and West Wawanosh, except that portion east of Maitland River.

7.—Comprising the Township of Goderich south of Cut Line and Huron Road until the same joins the road between the 12th and 14th concessions of the Township of Goderich; thence along the said concessions until the same joins the River Bayfield; all Stanley not included in number 3; and the Village of Bayfield.

8.—Comprising the Village of Wingham, the Township of Turnbury; all that part of East Wawanosh not included in number 12, and all the Township of Morris not included in Nos. 4 and 12.

9.—Comprising the Township of Howick and the Village of Wroxeter.

10.—Comprising the Township of Hay.

11.—Comprising the Township of Stephen.

12.—Commencing at the north-east angle of the Township of Hullett, thence southerly along the easterly boundary of the said Township of Hullett to the blind line, between the 7th and 8th concessions of said township; thence westerly along said line to the western boundary of the township; thence northerly along the westerly boundary of the township to the Maitland River at the south eastern corner of the Maitland Block; thence along the said river northerly till the western boundary of East Wawanosh is reached; thence northerly along said westerly boundary to the road running between the 6th and 7th concessions of said Township of East Wawanosh; thence easterly along said road to the easterly limit of said township; thence northerly along the gravel road to the road running between the 5th and 6th concessions of the Township of Morris; thence easterly along said road to the line between lots 10 and 11; thence southerly along said line between the 6th and 7th concessions; thence easterly along said line to the line between lots 15 and 16; thence southerly to the boundary line between the Townships of Morris and Hullett; thence easterly to the place of beginning, including the Village of Blyth.

COUNTY OF KENT.

1.—The First Division to consist of the Town of Chatham and that part of the Townships of Dover East and West to the south of the 12th and 13th concession line of the Township of Dover East; and that part of the Township of Chatham south of the 12th and 13th concession line, and west of the side road between lots 12 and 13, from the first mentioned 12th and 13th concession line to the 5th and 6th concession line, and all south of the said 5th and 6th concession line of said township; that part of the Township of Harwich north of 5th and 6th concession line, by the eastern boundary; that part of the Township of Raleigh north of the 16th concession to the west side road between lots 12 and 13 north to the 6th and 7th concession line, and all of the said township north of the said last mentioned line, and that part of the Township of Tilbury East north of the 4th concession.

2.—The Second Division to consist of that part of the Township of Howard south of the 2nd and 3rd concession line by the eastern boundary (known as the Botany Road), and that part of the Township of Orford south of the 10th and 11th concession line of said township.

3.—The Third Division to consist of all that part of the Gore of Camden lying west of the 10th and 11th concession line, and that part of the Township of Camden lying west of the side line between lots 6 and 1; the Village of Dresden; and that part of the Township of Chatham north of the 5th and 6th concession line and east of the side road between lots 12 and 13.

4.—The Fourth Division to consist of that part of the Township of Harwick south of the 5th concession of the eastern boundary, and south of the third concession by the western boundary, and that part of Raleigh south of the 15th concession and east of the side road between lots 12 and 13, and the road to the Lake shore through lot 146 on the Talbot road.

5.—The Fifth Division to consist of the Village of Wallaceburg, the Gore of Chatham, and that part of the Township of Chatham northwest of the 12th and 13th concession line and west of the said road between lots 12 and 13, and that part of Dover East lying north of the 12th and 13th concession side road.

6.—The Sixth Division to consist of that part of the Township of Howard north of the Botany road aforesaid, and of that part of the Township of Oxford north of the 10th and 11th concession line, the Township of Rone, the Town of Bothwell, the Village of Thamesville, and that part of the Gore of Camden east of the 10th and 11th concession line, and that part of the Township of Camden east of the side line between lots 6 and 7.

7.—The Seventh Division to consist of that part of Tilbury East south of the 3rd concession, the Township of Romany, and that part of the township of Raleigh, south of the 6th and 7th concession line and west of the side road between lots 12 and 13 in the said township, and the road through lot 147 on Talbot road.

COUNTY OF LAMBTON.

1.—The external boundaries of the Township of Sarnia and the Town of Sarnia.

2.—The external boundaries of the Township of Warwick, including that portion of the Village of Arkona south of the township line.

3.—The external boundaries of the Townships of Euphemia and Dawn.

4.—The external boundaries of the Township of Sombra.

5.—The external boundaries of the Township of Plympton.

6.—The external boundaries of the Township of Bosanquet, including that portion of the Village of Arkona north of the township line.

7.—The external boundaries of the Township of Moore.

8.—The external boundaries of the Township of Enniskillen.

9.—The external boundaries of the Township of Brock.

COUNTY OF LANARK.

1.—The Townships of Drummond, Bathurst, South Sherbrooke, Burgess North, and that part of the Township of Elmsley North, north of

the Rideau River, within the County of Lanark and west of lot No. 12 in each concession.

2.—The Townships of Lanark, Dalhousie, Darling, Lavant and North Sherbrooke.

3.—The Township of Beekwith, and the first six lots in the first seven concessions of the Township of Ramsay.

4.—The Township of Montague, and that part of the Township of North Elmsey from lot No. 1 to lot No. 12, in each concession, both inclusive.

5.—The Township of Pakenham.

6.—The Township of Ramsay, with the exception of the first six lots on the first seven concessions of the said township.

UNITED COUNTIES OF LEEDS AND GRENVILLE.

1.—To consist of the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th concessions and broken front of the Township of Elizabethtown, and the concession roads between them.

2.—To consist of the 1st, 2nd, 3rd, 4th and 5th concessions, and broken front, and that part of the 6th, 7th and 8th concessions from the town line of Edwardsburg to lot No. 18, inclusive of the Township of Augusta, and the concession roads between them.

3.—To consist of the 1st, 2nd, 3rd, 4th and 5th concessions and broken front of the Townships of Leeds and Lansdowne, respectively, and the concession roads between them.

4.—To consist of the Township of South Gower, the Township of Oxford from the west side line of lots numbers 11 in all the concessions of the eastern boundary of the township, and the gore of land between South Gower, Oxford and Edwardsburg.

5.—To consist of the Township of Wolford (except the 7th and 8th concessions and the allowance of roads within and between them), lots No. 1 to 10 inclusive, in the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th concessions of the Township of Oxford, and the allowance of roads within and between them.

6.—To consist of the Townships of Bastard and Burgess, and those parts of the Townships of Leeds and Lansdowne, on the north side of the rear of the 5th concession in each, respectively.

7.—To consist of the Townships of Kitley and Elmsley.

8.—To consist of the Townships of North Crosby and South Crosby.

9.—To consist of that part of the Townships of Escott and Yonge, in rear of the 4th concession of Yonge, and in the rear of the 6th concession of Escott; that part of the Township of Elizabethtown, in rear of the 7th concession, and west of lot No. 18 in the 8th, 9th, 10th and 11th concessions, and the allowances for roads embraced therein.

10.—To consist of the Township of Edwardsburg.

11.—To consist of that part of the Township of Augusta, in rear of the 5th concession and west of lot No. 18, in the 6th, 7th, and 8th concessions; the whole of the 9th and 10th concessions of the Township of Augusta; the Gore between the Townships of Oxford, Wolford and Augusta; that part of the Township of Elizabethtown in rear of the 7th concession, and east of the commons, between lots No. 18 and 19 in the 8th, 9th and 10th concessions; the 7th and 8th concessions of the Township of Wolford; lots No. 1 to 10, inclusive, in the 9th and 10th concessions of the Township of Oxford; and the allowances for roads embraced therein.

12.—To consist of the 1st, 2nd, 3rd and 4th concessions and broken front of the Township of Yonge; the 1st, 2nd, 3rd, 4th, 5th and 6th concessions and broken front of the Township of Escott, and the allowance for roads embraced therein.

The said 1st, 2nd, 3rd and 12th Divisions shall, respectively, embrace and comprehend within their limits those portions of the River St. Lawrence, and Islands therein, within the exterior side lines of which such portions of said river and islands would lie and be, if such exterior side lines were produced and extended in that direction to the utmost limits of the Province.

COUNTY OF LENNOX AND ADDINGTON.

1.—The Town of Napanee; Township of Richmond; all that part of North Fredericksburgh and Adolphustown lying north of Hay Bay; and all that part of North Fredericksburgh lying north of Big Creek.

2.—Comprises 1st concession of Ernestown, the Village of Bath, the Township of Amherst Island, and the 2nd, 3rd and 4th concessions of the said Township of Ernestown, from the west limits thereof to the west limit of lot No. 21 in each concession.

3.—Township of South Fredericksburgh and all that part of North Fredericksburgh and Adolphustown, not included in Division No. 1.

4.—1st, 2nd and 3rd concessions of the Township of Camden and the Village of Newburg.

5. All that part of the Township of Camden not included in Division No. 4.

6.—All that portion of the Township of Ernestown not included in the limits of Division No. 2.

7.—Townships of Sheffield, Kalada, Anglesen, Abinger, Effingham, Ashby and Denbigh.

COUNTY OF LINCOLN.

1.—The Town and Township of Niagara.

2.—The Township of Gratiot (including the City of St. Catharines, the Villages of Merriton and Port Dalhousie), and the Township of Louth.

3.—The Townships of Caistor and Gainsborough, and the 9th concession of the Township of Grimsby, including the 1st and 2nd ranges as part of the said concession.

4.—The Villages of Grimsby and Beamsville; the Township of Clinton and the Township of Grimsby, except the 9th concession and 1st and 2nd included as part of the said 9th concession.

DISTRICT OF MANITOULIN.

1.—The Town of Gore Bay, the Townships of Gordon, Allan, Campbell, Mills, Burpee, Robinson, Dawson, the islands known as Cockburn, Barrie, Clapperton and the Duck Islands and that part of the Township of Billings lying west of the road allowance between lots 15 and 16 in the several concessions thereof and so much of the Township of Carnarvon as lies west of Lake Mindemoya and north of the line between the 6th and 7th concessions thereof.

2.—The Town of Little Current, the Township of Howland and those parts of the Townships of Sheguindah and Bidwell, lying north of the line between the 6th and 7th concessions of Sheguindah, and 4th and 5th concessions of the Township of Bidwell, and the 6th and 7th concessions of the line between lots 17 and 18 in the Township of Billings, and the adjacent islands lying north and east of the said Townships, except the Clapperton Island.

3.—Manitowaning, the Townships of Assiginack, Tehkummah and Sandfield and those parts of the Township of Sheguindah lying south of the line between the 6th and 7th concessions of Sheguindah, and 4th and 5th concessions of the Township of Bidwell, and the 6th and 7th concessions of the Township of Billings to the line between lots 17 and 18 of said Township, and the Township of Carnarvon, except so much of the same as lies west of Mindemoya Lake, and all that part of Manitoulin lying east of the Township of Assiginack, Manitowaning and South Bays and the islands adjacent thereto.

COUNTY OF MIDDLESEX.

1.—That part of the City of London lying to the west of Maitland street, with that portion of the Township of London lying south of the line between the 4th and 5th concessions and west of the said street, produced northerly or a line in the same direction to the line between the said 4th and 5th concessions, and with that portion of the Township of Westminster lying west of the main road leading south from Clarke's Bridge across the Thames; south to the line between the 1st and 2nd concessions; and westerly to the line between lots 42 and 43, and extending northerly to the River Thames; and also including the Village of London West.

2.—The Villages of Parkhill and Ailsa Craig, the Townships of East Williams and West Williams, and that portion of the Township of Lobo lying north of the line between the 11th and 12th concessions; and east of the line between lots numbers 12 and 13.

3.—The Townships of McGillivray and Biddulph and the Village of Lucan.

4.—The Township of Delaware, with that portion of the Township of Westminster west of the line between lots 30 and 31 in the second concession; then southerly on the line between lots 20 and 21, to the southerly limit of the township, including all west of said line, and also including all that portion of the front of said Township of Westminster, lying west of the line between lots numbers 42 and 43, not included in the first division; with that portion of the Township of Caradoc lying south of the line between the 5th and 6th concessions, to the River Thames; and with that portion of the Township of Lobo, lying south of the line, between the 6th and 7th concessions, to the River Thames.

5.—The Townships of Exfrid and Mosn, including the Villages of Wardsville, Newbury and Glencoe.

6.—Townships of Adelaide and Metcalfe; the Town of Strathroy, with that portion of the Township of Caradoc lying north of the line, between the 3rd and 4th concessions; with that portion of the Township of Lobo which lies north of the 6th concession and west of the line between lots 12 and 13 of the said township.

7.—The Township of North Dorechester, north and south of the River Thames; that portion of the Township of West Nissouri which lies south of the line between lots 14 and 15; and with that portion of the Township of Westminster lying south of the line between the 1st and 2nd concess-

sions, and east of the line between lots 30 and 31 in the second concession, and thence east of the line between lots 27 and 21, continued south to the southerly limit of the said Township of Westminster.

8.—All that portion of the Township of London which lies north of the line between the 4th and 5th concessions; that portion of the Township of Lobo which lies north of the line between the 6th and 7th concessions, and east of the line between lots 12 and 13, to the line between the 11th and 12th concessions, and with all that portion of the Township of West Nissouri which lies north of the line between lots numbers 14 and 15.

9.—That part of the City of London lying east of Maitland street; that part of the Township of London lying south of the line between the 4th and 5th concessions and east of the said street, produced northerly or in a line in the same direction to the line between the said 4th and 5th concessions; and that part of the Township of Westminster lying north of the line between the 1st and 2nd concessions, and east of the main road leading south from Clarke's Bridge across the Thames.

DISTRICT OF MUSKOKA.

1.—The Village of Bracebridge, and the Townships of Macaulay, McLean, Kidout, Monek and Cardwell, concessions 1, 2, 3, 4, 5, 6, 7, 8 and 9 in the Townships of Stephenson, Bruce and Franklin, and that part of the Township of Watt, situated east of lot 21, in the several concessions thereof; and concessions 7, 8, 9, 10, 11, 12 and 13 in the Townships of Muskoka and Draper.

2.—The Village of Gravenhurst; the Townships of Morrison, Ryder and Oakley, and concessions 1, 2, 3, 4, 5 and 6 of the Townships of Muskoka and Draper.

3.—The Village of Huntsville; the Townships of Stisted, Chaffey and Sinclair; and concessions 10, 11, 12, 13 and 14 in the Townships of Stevenson, Brunel and Franklin.

4.—The Townships of Wood, Medora and Humphrey, and that part of the Township of Watt situated west of lot 21 in the several concessions thereof.

DISTRICT OF NIPISSING.

1.—To be composed of the Townships of Springer, Field, Badgerow, Caldwell and all that part of the District of Nipissing which is situated west of the line between the Indian Reserve and the Township of Widdifield, produced north and south, to the boundary of the said district and east of the eastern boundary of the fourth division.

2.—To be composed of the Townships of Mattawan, Orlig, Calvin, Papineau, Lauder, Pentland, Boyd, Osler, McLaughlin, Canisby, Sabine, Lyell, Airy, Murchison and Robinson, and all that part of the District of Nipissing situated east of the line between the Townships of Bonfield and Calvin, produced south to the provisional County of Haliburton, and east of the line between the Townships of Phelps and Orlig, produced north to the Ottawa River.

3.—To be composed of the Townships of Widdifield, Merriek, Mulock, Phelps, Ferris-Chisholm, Ballantyne, Wilkes, Biggar, Paxton, Butt, Devine, Hunter, McCraney, Finlayson, Peck, and all that part of the District of Nipissing situated west of the line between the Townships of Phelps and Orlig, produced north to the Ottawa River and east of the eastern boundary of first division.

4.—To be composed of the Townships of McKim, Neelon, Dryden, Blezard and all that part of the District of Nipissing which is situated west of the line between the said Township of Awrey and the Township of Hagar, produced north and south to the boundary of the said district.

5.—To be composed of the Townships of Bonfield and Boulter.

6.—To be composed of Awrey, Hagar, Rutter, Hugel, Kirkpatrick, Dunnett, Appleby and Hawley, together with that portion of the said District of Nipissing lying north and south of the said district townships between lines produced northerly and southerly along the easterly and westerly boundaries of the said division.

7.—To be composed of the townships of Lorain, Buckley, Dymond, Harris, Casey, Brethour, Harley, Hilliard, Ingram, Hudson, Kerns, Armstrong, Evanturell, Marter, Henwood, Beauchamp, Daek, Chamberlain, Pacaud, Bryce, Robillard, Savard, Marquis, Otto, Eby, Blain and Sharpe, and those portions of the unsurveyed parts of the said District lying northerly of the line marking the northerly boundary of the township of Wyse, produced westerly till it meets the line between the townships of Badgerow and Hugel, produced northerly for a distance of eighteen miles and easterly of the last mentioned line, produced northerly to the boundary of the said district.

COUNTY OF NORFOLK.

1.—The Town of Simcoe, the Gore of the Township of Woodhouse, and all that part of said township lying west of the side line between lots 5 and 6, together with that part of the 4th, 5th and 6th concessions lying west of the side line between lots 12 and 13.

2.—The Township of Townsend, and the Village of Waterford.

3.—The Township of Windham.

4.—The Township of Middleton, and the Village of Delhi.

5.—The Township of Charlotteville.

6.—The Townships of North Walsingham, South Walsingham and the Village of Port Rowan

7.—The Township of Houghton.

8.—The Village of Port Dover, and that part of the Township of Woodhouse not included in Division No. 1, viz.: all that part of the 1st, 2nd and 3rd concessions lying east of the side line between lots 5 and 6, and that part of the 4th, 5th and 6th concessions lying east of the said line, between lots 12 and 13 in said township.

UNITED COUNTIES OF NORTHUMBERLAND AND DURHAM.

1.—Townships of Cartwright and Darlington, and the Town of Bowmanville.

2.—Township of Clarke and Village of Newcastle.

3.—Township of Hope and Town of Port Hope.

4.—Township of Caven, Manvers, South Monaghan and Village of Millbrook.

5.—Township of Hamilton and Town of Cobourg.

6.—Townships of Haldimand and Alnwick.

7.—Township of Cramahe and Village of Colborne.

8.—Township of Brighton and Village of Brighton.

9.—Township of Percy and Village of Hastings.

10.—Township of Murray.

11.—Township of Seymour and Village of Campbellford.

COUNTY OF ONTARIO.

- 1.—Including the Townships of Whitby and East Whitby and the Towns of Whitby and Oshawa.
- 2.—The Township of Pickering.
- 3.—The Townships of Reach and Seugog and the Village of Port Perry.
- 4.—The Townships of Uxbridge and Scott and the Town of Uxbridge.
- 5.—The Township of Brook and the Village of Cannington.
- 6.—The Township of Thorah, and all that part of the Township of Mara lying south of the line between the 4th and 5th concessions.
- 7.—All that part of the Township of Mara lying north of the line between the 4th and 5th concessions thereof, and the Township of Rama.

COUNTY OF OXFORD.

- 1.—Comprising the Town of Woodstock, the Townships of Blandford, East Zorra, East Oxford, and that part of the Township of North Oxford situated east of lot 16, and that part of West Oxford lying east of lot No. 7 to the Stage Road, thence on the north side of the Stage Road to where the said road intersects the Township of East Oxford.
- 2.—Comprises the Township of Blenheim.
- 3.—Comprises the Townships of West Zorra and East Nissouri.
- 4.—Comprises the Townships of North Norwich and South Norwich and the Village of Norwich.
- 5.—Comprises all those portions of the Townships of North Oxford and West Oxford not comprised in the 1st Division; the Town of Ingersoll, and those portions of the 1st and 2nd concessions of the Township of Durham west of the Middle Town line.
- 6.—Comprises the Town of Tilsonburg and all that portion of the Township of Durham not included in the 5th Division.

DISTRICT OF PARRY SOUND.

- 1.—The Town of Parry Sound and the Townships of Foley, McDougall, Cowper and Carling, and all that portion of the district lying to the west of the east boundary of Carling, produced to the French River.
- 2.—The Townships of McKellar, Croft, Hagerman, Ferguson and all that portion of the district lying between the east boundary of Ferris and the west boundary of Ferguson, produced to the French River.
- 3.—Townships of Humphrey, Christie, Monteith and Conger.
- 4.—Townships of McMurrich, Perry and Armour.
- 5.—The Townships of Spence, Chapman, Ryerson, Lount, Proudfoot, Bethune and Sinclair.
- 6.—That territory bounded on the west by the western boundaries of Townships of Pringle and Patterson, and the western boundary of the Township of Patterson, produced to French River and Lake Nipissing; on the east by the boundary of the District of Parry Sound, and on the south by the southern boundaries of the Townships of Himsworth, Gurd and Pringle.
- 7.—The Townships of Machar, Laurier, Strong and Joly.

COUNTY OF PEEL.

- 1.—Town of Brampton, Township of Chinguacousy and northern Division of Township of Toronto Gore.
- 2.—Village of Streetsville, Township of Toronto, and southern Division of Township of Toronto Gore.
- 3.—Township of Caledon.
- 4.—Village of Bolton, Township of Albion.

COUNTY OF PERTH.

- 1.—To consist of all that part of the Township of North Easthope west of the line between lots 25 and 26, and south of the road between the 8th and 9th concessions, and all that part of the Township of South Easthope west of the side line, between lots 25 and 26; all that part of the Township of Downie and Gore north and east of the concession line, between the 10th and 11th concessions and the Oxford Road; and all the Township of Ellisee from the 1st to the 13th concession, inclusive.
- 2.—To consist of all that part of the Township of Fullerton not included in Division No. 3, and the Townships of Gibbert and Loga.
- 3.—To consist of that portion of the Township of Downie west of the Oxford Road, and south of the concession line between the 9th and 11th concessions; the Township of Blanchard; all that part of the Township of Fullerton comprising the 13th and 14th concessions, and south of a road leading from the Mitchell Road, between lots 24 and 25, east to lot 3 in the 10th concession; thence east along the line between the 10th and 11th concessions to the town line.
- 4.—To consist of that part of the Township of North Easthope east of the line, between lots 25 and 26, and north of the 8th concession, inclusive, with the 9th and 10th concession; all that part of the Township of South Easthope not included in Division No. 1.
- 5.—To consist of the Township of Mornington, and all that part of the Township of Elma from lots 53 to 72, both numbers inclusive, of the 1st concession, and from lots Nos. 27 to 36, both numbers inclusive, in and from the 2nd to the 18th concession, both concessions inclusive, of the said Township of Elma; and concessions 14, 15 and 16 of the Township of Ellisee; and concessions 11th, 12th, 13th and 14th of the Township of North Easthope.
- 6.—To consist of the Township of Wallace, and all that part of the Township of Elma from the first concession to the 18th concession, both concessions inclusive, and comprising lots Nos. 1 to 52, both inclusive, of the 1st concession, and lots Nos. 1 to 26, inclusive, from the 2nd to the 18th concession, both concessions inclusive.

COUNTY OF PETERBOROUGH.

- 1.—Composed of the Town of Peterborough, the Village of Ashburnham, the Townships of North Monaghan and Ennismore, and all that part of the Township of Harvey lying west of Pigeon Lake and south of Bobcaygeon; and all the Township of Smith lying south of the 7th concession; and all the Township of Otonabee lying west of the 8th concession and north of lots 21 from the said 8th concession to the western boundary of said Township of Otonabee; and all the Township of Douro lying south of lots numbered 11; and all that part of the Township of Dummer lying south of lots numbered 11 and west of the 5th concession.

2.—Composed of the Township of Asphodel, Belmont and Methuen, and that part of the Township of Dummer lying east of the 4th concession and south of lots numbered 1 to 11.

3.—Composed of all that part of the Township of Otonabee lying east of the 9th concession; and all that part of the said Township of Otonabee lying south of lots numbered 22 and west of the 8th concession.

4.—Composed of all that part of the Township of Smith lying north of the 6th concession; all that part of the Township of Douro lying north of lots numbered 10; and all that part of the Township of Dummer lying north of lots numbered 10; and also of the Village of Lakefield, and of the Township of Galway, and all the Township of Harvey, except that portion lying west of Pigeon Lake and south of Bobcaygeon.

5.—Composed of the Townships of Burleigh, Cavendish, Austruther and Chandos.

UNITED COUNTIES OF PRESCOTT AND RUSSELL.

1.—Comprises the whole of the Township of Longueuil, the municipality of the Village of L'Original, and the 1st concession of the Township of Caledonia.

2.—Comprising all that part of the Township of West Hawkesbury, extending from front of the 3rd concession to the rear of the said township.

3.—Comprises the whole of the Township of East Hawkesbury.

4.—Comprising the Township of North Plantagenet, and that part of the Township of South Plantagenet lying north of the Nation River.

5.—Comprising the whole of the Township of Cumberland.

6.—Comprising the whole of the Township of Russell.

7.—Comprising the two front concessions of the Township of West Hawkesbury, and the Municipality of Hawkesbury Village, within the same.

8.—Comprising the Township of Caledonia (excepting the first concession of the said township), and also that portion of the Township of South Plantagenet lying south and east of the Nation River.

9.—Comprises the whole of the Township of Alfred.

10.—Comprises the whole of the Township of Clarence.

11.—Comprises the whole of the Township of Cambridge.

COUNTY OF PRINCE EDWARD.

1.—The Town of Pieton, the 2nd and 3rd concessions of "Military Tract," from the west line of lot No. 13, eastward; Gore "G"; 1st and 2nd concessions north of the Carrying Place; 1st concession south-east of the Carrying Place, and 2nd concession north of Black River, including Gores "K" and "L" and McCan Gores, all in the Township of Hallowell; Block "I" the concessions north and east of East Lake, and Gore "B" in the Township of Athol, and 1st and 2nd concessions south of the Bay of Quinte, and Gore "A" in the Township of North Marysburg, and 1st concession southwest of Green Point, to the end of Carman's Point in Sophiasburg.

2.—The Township of South Marysburg, and the southern part of Athol, commencing at the outlet of East Lake, thence down to the head

of the lake, thence down to the base line between the 1st concession south and the 1st concession north of East Lake, till it strikes the township line of Hallowell, thence down said township line till it strikes South Marysburg.

3.—The Township of Sophiasburg, together with Big Island, excepting the 1st concession southwest of Green Point to the end of Carman's Point.

4.—All that part of the Township of Ameliasburg lying east of the line between lots Nos. 86 and 87, in the 1st, 2nd, 3rd and 4th concessions of said Township, including Huff's Island.

5.—That part of the Township of Hillier not included in the 7th Division, also the 1st and 2nd concessions north of West Lake, and west of lot No. 7 in the said concession, and that part of Irwin Gore lying north of and west of lot No. 7 in the 2nd concession, and the west part of the 2nd concession produced west of lot No. 74, in that concession, in the Township of Hallowell.

6.—Block (IV.) four, concession south side of West Lake, 1st concession "Military Tract, 2nd and 3rd concessions of said tract west of lots No. 13 in those concessions, Gore "E" 1st and 2nd concessions north of West Lake and east of lot No. 6 in those concessions; the Gerrow Gore and that part of Irwin Gore not included in Division No. 8, and all that part of the 2nd concession produced east of lot No. 75 in the Township of Hallowell.

7.—All that part of the Township of Ameliasburg lying west of the line between lots Nos. 86 and 87, in the 1st, 2nd, 3rd and 4th concessions of said township; all that part of the 4th and 5th concessions of the Township of Hillier west of the line between lots Nos. 86 and 87, and the third concession west of the line between lots Nos. 22 and 23, with that part of the 2nd concession lying north of Pleasant Bay in the said Township of Hillier.

8.—All the point lying east of the west line of Marshland's Gore, the concession north of Smith's Bay and Waupoos Island in the Township of North Marysburg.

DISTRICT OF RAINY RIVER.

1.—That part of the district composed of the territory lying west of a line commencing at Pickeral Rapids on Cedar and Manitou Lakes, and extending northwards parallel with the Sixth Meridian line to the northern boundary of the district, and north of the line drawn from the mouth of the Rainy River, at Hungry Hall, in a north and easterly direction along the shore of the Lake-of-the-Woods to the easterly end of Sabiskong Bay, thence easterly to the said Pickeral Rapids.

2.—That part of the district composed of the territory lying south of said line, drawn from the mouth of Rainy River, at Hungry Hall, in a north-westerly direction along the shore of the Lake-of-the-Woods to the eastern end of Sabiskong Bay, thence easterly to where it intersects a line extending northwards, from its easterly boundary line to the Townships of Aylesworth, Lash and Carpenter, and west of the said line extended northwards from the eastern boundary of the said townships.

3.—That part of the district composed of the said line forming the eastern boundary of the said above mentioned townships, extended northward and south of the said line running eastward from the east end of Sabiskong Bay to Pickeral Rapids, and extended further in an easterly direction to the boundary line, between the district of Rainy River and Thunder Bay, at the south-west angle of Hawke Lake.

4.—That part of the district lying north of the western boundary of the said Third Division Court, and east of the eastern boundary of the said first Division Court.

COUNTY OF RENFREW.

1.—Comprising the Town of Pembroke, the Townships of Pembroke, Stafford, Alice, Petawawa, Buchanan, Rolph, Wylie, McKay, Fraser, Herd, Clara and Maria, and all that part of the Township of Wilberforce from the 18th to the 26th concessions, both inclusive; and also those parts of the 14th, 15th, 16th and 17th concessions of the same Township of Wilberforce lying north of Snake River and east of Lake Dore.

2.—Comprising all that part of the Township of Westmeath lying east and north of the Muskrat Lake and River and all those parts of the Township of Ross, from the 5th to the 9th concession, both inclusive, east of Muskrat Lake, and from the 7th to the 13th (of the other) concessions of Ross, both inclusive, of the said Township of Ross.

3.—Comprising the Village of Renfrew, and the Townships of Horton and Admaston, excepting the lots numbered 1 to 22 inclusive, in the 9th, 10th, 11th, and 12th concessions and the whole of the concessions numbering 13, 14, 15 and 16 in said township.

4.—Comprising the Village of Arnprior and the Township of McNab.

5.—Comprising the Townships of Bagot, Blythesfield, Brougham, and Matawatchan, and all the lots numbered 1 to 22, inclusive, in the 9th, 10th, 11th and 12th concessions in the said Township of Admaston, and the whole of the concessions numbered 13, 14, 15 and 16 in the said townships.

6.—Comprising the Townships of Grattan, Sebastopol, South Algoma, North Algoma, and all that part of the Township of Wilberforce from the 1st to the 17th concessions, both inclusive, excepting those parts of the 14th, 15th, 16th and 17th concessions of said Township of Wilberforce lying north of Snake River and east of Lake Dore.

7.—Comprising the Township of Bromley, and all that part of the Township of Westmeath west of Muskrat Lake, and all those parts of the Township of Ross, from the 1st to the 4th concessions, both inclusive, east of Muskrat Lake, and from the 1st to the 6th of the other concessions, both inclusive, of the said Township of Ross.

8.—Comprising the Townships of Brudenell, Radeliffe, Raglan, Lynedoch, Griffith, Hagarty, Sherwood, Jones, Richards and Burns.

COUNTY OF SIMCOE.

1.—Comprising the Town of Barrie, the Township of Vespra, except that portion lying west of the Nottawasaga River, and excepting also lots Nos. 38, 39 and 40 in the 1st and 2nd concessions, and lots Nos. 1, 2 and 3 in the 3rd, 4th, 5th, 6th and 7th concessions, respectively. That portion of the Township of Oro lying south of lots Nos. 21 in the 1st and 2nd concessions (including the Ranges) and south of lots Nos. 13 in the 3rd, 4th, 5th, 6th, 7th and 8th concessions, respectively; that portion of the Township of Innisfil lying east of lots Nos. 5 in the 6th, 7th and 8th concessions, and that portion lying north of the 8th concession; that portion of the Township of Essa lying north of lots Nos. 19 in the 7th, 8th, 9th, 10th and 11th concessions.

2.—The Village of Bradford; the Township of West Gwillimbury, excepting thereout lots Nos. 1, 2, 3, 4 and 5 in the 14th and 15th concessions; the Township of Innisfil, except that portion lying north of the 5th concession, and excepting also lots Nos. 1, 2, 3, 4 and 5 in the 1st, 2nd, 3rd, 4th and 5th concessions.

3.—The Township of Tecumseth, except concessions 12, 13, 14 and 15; the Township of Adjala, except that portion lying north of lots Nos. 25 in the 8th concession thereof.

4. The Town of Collingwood, the Village of Stayner, that portion of the Township of Nottawasaga lying north of lots Nos. 18 in the 12 concessions thereof; that portion of the Township of Sunnidale lying north of the 8th concession; that portion of the Township of Flos lying west of the Nottawasaga River; the Islands in Lake Huron contiguous to the Township of Nottawasaga.

5.—The Township of Flos, except that portion lying west of the Nottawasaga River, the Township of Medonte, except that portion lying east of the 10th concession; and north of lots Nos. 10 in the 9th and 10th concessions respectively; that portion of the Township of Oro, lying north of the southern boundaries of lots Nos. 21 in the 1st and 2nd concessions, and north of the southern boundaries of lots Nos. 13 in the 3rd, 4th, 5th, 6th, 7th and 8th concessions, respectively; lots 38, 39 and 40 in the first and second concessions, and lots Nos. 1, 2 and 3 in the 3rd, 4th, 5th, 6th and 7th concessions of the Township of Vespra.

6.—The Town of Orillia, the Township of Orillia, southern division, the Township of Orillia, northern division, except that portion lying north of lots Nos. 15 in the first seven concessions thereof; that portion of the Township of Oro lying east of the 8th concession; that portion of the Township of Medonte being composed of lots Nos. 1 to 6 (both inclusive) in the 11th, 12th, 13th and 14th concessions; the Islands in Lake Simcoe contiguous to the townships and portions of townships above described lying wholly or for the most part opposite thereto.

7.—The Township of Nottawasaga, except that portion lying north of lots Nos. 18 in the 12th concession thereof; the Township of Sunnidale, except that portion lying north of the 8th concession; that portion of the Township of Vespra lying west of the Nottawasaga River; that portion of the Township of Essa lying north of lots Nos. 19 in the 1st, 2nd, 3rd, 4th, 5th and 6th concessions; that portion of the Township of Tossorontio lying north of lots Nos. 20 in each of the seven concessions thereof.

8.—The Township of Essa except that portion lying north of lots Nos. 19 in each of the eleven concessions thereof; the Township of Tossorontio, except that portion lying north of lots Nos. 20 in each of the seven concessions thereof, that portion of the Township of Innisfil being composed of lots Nos. 1, 2, 3, 4 and 5 in the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th and 8th concessions; the 12th, 13th, 14th, and 15th concessions of the Township of Tecumseth; lots Nos. 1, 2, 3, 4 and 5 in the 14th and 15th concessions of the Township of West Gwillimbury; that portion of the Township of Adjala lying north of lots Nos. 25 in the eight concessions thereof.

9.—The Town of Penetanguishene, and the Village of Midland, the Township of Tiny; that portion of the Township of Tay lying west of the 8th concession; the Islands in Lake Huron contiguous to the Township of Tiny, and to that part of the Township of Tay, forming part of the ninth division, and lying wholly and for the most part opposite thereto.

10.—The Township of Matchedash, that portion of the Township of Orillia, northern division, lying north of lots Nos. 15 in the first seven concessions thereof; that portion of the Township of Medonte lying north of lots Nos. 6, in the 11th, 12th, 13th, and 14th concessions, and that portion lying north of lots Nos. 10, in the 9th and 10th concessions thereof; the Township of Tay, except that portion lying west of the 8th concession; the Island in Lake Huron, contiguous to that portion of the Township of Tay, forming part of the 10th division, and lying wholly or for the most part opposite thereto.

NOTE.—Each of the said several divisions shall include all allowances for roads embraced within its external limits, and shall also extend to

the centre of every allowance for road lying external and adjacent to every such division, excepting always where any such last mentioned allowance is hereinbefore declared to belong to or form part of any particular division.

UNITED COUNTIES OF STORMONT, DUNDAS AND GLENGARRY.

- 1.—Township of Charlottenburg, in the County of Glengarry.
- 2.—Township of Lochiel, in the County of Glengarry.
- 3.—Town and Township of Cornwall, in the County of Stormont.
- 4.—Township of Osmoruck, in the County of Stormont.
- 5.—Township of Williamsburg, in the County of Dundas.
- 6.—Township of Matilda, in the County of Dundas.
- 7.—Township of Mountain, in the County of Dundas.
- 8.—Township of Finch, in the County of Stormont.
- 9.—Township of Lancaster, in the County of Glengarry.
- 10.—Township of Winchester, in the County of Dundas.
- 11.—Township of Roxborough, in the County of Stormont.
- 12.—Township of Kenyon, in the County of Glengarry.

DISTRICT OF THUNDER BAY.

- 1.—All that part of the District lying west of the meridian of 87 degrees of west longitude, to the meridian of the most easterly part of Hunter's Island, excepting therefrom the Municipality of Neebing.
- 2.—
- 3.—Comprising the municipality of Neebing.

COUNTY OF VICTORIA.

- 1.—The first consists of the following townships and parts of townships, viz.: of the 15th concession of the Township of Mariposa, and the Township of Eldon, except the ranges north and south of Portage Road.
- 2.—The second consists of the following townships: all of the Township of Fenelon, except that portion lying east of the Seugog River, and south of Sturgeon Lake, and the Township of Somerville.
- 3.—The third consists of the Township of Verulam.
- 4.—The fourth consists of the Township of Emily.
- 5.—The fifth consists of the Town of Lindsay, Township of Ops, and that portion of the Township of Fenelon lying east of the Seugog River, and south of Sturgeon Lake.
- 6.—The sixth consists of the Township of Mariposa, except the 15th concession.
- 7.—The seventh consists of the Townships of Carden and Dalton, Laxton, Digby and Longford, and the Township of Bexley, and that portion of the Township of Eldon north of Portage Road, and the range south of Portage Road.

COUNTY OF WATERLOO.

1.—All that portion of the Township of Waterloo lying north of Block line on the west side of the Grand River, and that part of the upper block of said township lying on the east side of the Grand River, north of lots Nos. 115, 109, 104, 86 and 95 to the Guelph Township line, including the Towns of Berlin and Waterloo.

2.—All that part of the Township of Waterloo lying south of the Block line on the west of the Grand River, and that part lying on the east side of the Grand River, south of the northern boundary of lots Nos. 115, 109, 104, 85 and 95, to the Guelph Township line, including the villages of Preston and Hespeler.

3.—All that portion of the Township of North Dumfries lying east of lot No. 19, in the 7th concession, and running a course with the eastern boundary of the said lot in a northerly direction up to the 12th concession; thence along the eastern boundary of lot No. 23, in the said 12th concession, to the township line, including the Town of Galt.

4.—The Township of Wilmot, including the Village of New Hamburg.

5.—The Town of Wellesley.

6.—The Township of Woolwich.

7.—All that part of the Township of North Dumfries lying west of the eastern boundary of said lot No. 18, in the 7th concession; thence along the eastern limits of said lot No. 19, the same course thereof, in a northerly direction to the 15th concession; thence along the westerly limit of lot No. 23, in the said 12th concession, to the township line, including the Village of Ayr.

THE COUNTY OF WELLAND.

1.—Comprising the Township of Crowland; that part of the Township of Thorold lying south of the line between lots 178 and 195, running through to Pelham; that part of Pelham lying south of the 4th concession, and that part of Humberstone lying north of the concession line, between the 4th and 5th concessions, being the whole of the 15th concession and the Town of Welland.

2.—Comprising the Township of Wainfleet.

3.—Comprising the Township of Bertie, and those parts of the Township of Humberstone not included in Nos. 1 and 6, and the Village of Fort Erie.

4.—Comprising the Township of Willoughby, the Village of Chippawa, and that part of the Township of Stamford south of the line between lots 136 and 137; easterly from the western limit of the township to the south-east angle of lot No. 133; thence north on the line between lots Nos. 132 and 133, to the northern boundary of the township, including the Towns of Clifton and Navy Island.

5.—Comprising those parts of the Township of Stamford, Thorold and Pelham, not included in any other division, and the Town of Thorold.

6.—Comprising all the Township of Humberstone, lying south of the 5th concession, and west of the side lines, between lots Nos. 9 and 10 in the several other concessions thereof, and the Village of Port Colborne.

COUNTY OF WELLINGTON.

- 1.—The Town and Township of Guelph.
- 2.—The Township of Puslinch.
- 3.—The Township of Eramosa.
- 4.—Consisting of the Township of Nichol, excepting the 11th and 12th concessions; the Municipality of Fergus; the first eight concessions of the Township of Garafraxa, and lots 1 to 18, both inclusive, in concessions A and B of the Township of Peel, lots 13, 14, 15, 16, 17 and 18, in concessions 18 and 19, and lots 19, 20 and 21 in the 17th concession of the Township of Peel.
- 5.—The Township of Erin.
- 6.—Consisting of the Township of Pilkington, and the 11th and 12th concessions of the Township of Nichol; the Municipality of the Village of Elora, and lots Nos. 19 and upwards belonging to the 9th, 10th, 11th, 12th, 13th, 14th, 15th and 16th concessions of Peel.
- 7.—Consisting of concessions 1 to 16, inclusive, of the Township of Peel, except lots 19, 20, 21, 22 and 23 of those concessions in that township.
- 8.—Consisting of that part of the Township of Arthur, south and south-east of lot 15 on the west side of the Owen Sound Road, in the Township of Arthur; that part of the Township of Luther, from 1 to 16 both inclusive; and lots 1 to 12 both inclusive, of the 17th and 18th concessions of the Township of Peel; lots 5 to 11 both inclusive, of the 19th concession of the said Township of Peel; and lots 19 to 23, both inclusive, of concessions "A" and "B" of said Township of Peel.
- 9.—The territory formerly comprised in this division is now in the County of Dufferin.
- 10.—Consists of the Township of Minto.
- 11.—Consists of the Town of Mount Forest, and that part of the Township of Arthur north of lot 16, west of the Owen Sound Road; lot 17 on the Owen Sound Road, and lot 13 east of the Owen Sound Road.

COUNTY OF WENTWORTH.

- 1.—All that part of the Township of Barton lying east of the lines between lots 14 and 15, and all that part of Hamilton City east of Hughson Street.
- 2.—The whole of the Township of Flamboro' West, the Town of Dundas, and the east half of the Township of Ancaster.
- 3.—The whole of the Township of Flamboro' East.
- 4.—The whole of the Township of Beverley, and the west half of the Township of Ancaster.
- 5.—The whole of the Township of Saltfleet.
- 6.—The whole of the Township of Glanford.
- 7.—The whole of the Township of Binbrook.
- 8.—All that part of the Township of Barton lying west of the lines between lots 14 and 15, and that part of Hamilton City west of Hughson Street.

COUNTY OF YORK.

1.—The City of Toronto, east of Yonge Street, at date of 14th September, 1875 (*i.e.*, Bloor, Sherbourne and Howard Streets on the north, the Don on the east, down to Queen Street, and all south of Queen Street as far as Lee Avenue.

2.—Concessions 5 to 11 inclusive, of the Township of Markham; and concessions 5 to 10 inclusive, of the Township of Whitechurch from 1 to 10 inclusive, together with the Villages of Markham and Stouffville.

3.—Concessions 1 to 4 inclusive, of the Township of Markham; and concessions 1 to 4 inclusive, of the Township of Whitechurch from lots 1 to 10 inclusive; and concessions 1 to 3 inclusive, of the Township of Vaughan.

4.—The Township of Whitechurch, from the line between lots 10 and 11 northward; and the Township of East Gwillimbury.

5.—The Townships of Georgina and North Gwillimbury.

6.—The Township of King and the incorporated Village of Aurora.

7.—Concessions 1 to 11, inclusive, of the Township of Vaughan.

8.—All that portion of the Township of York lying west of Yonge Street, and the Township of Etobicoke.

9.—Township of Scarboro' and all that portion of the Township of York which lies east of Yonge Street and the Village of Leslieville.

10.—The City of Toronto, west of Yonge Street, at date of 10th Sept., 1875, (*i.e.*, Bloor Street on the north and Dufferin Street on the west).

APPENDIX.

OTHER STATUTORY PROVISIONS RELATING TO DIVISION COURTS.

The following Statutes contain provisions applicable to Division Courts.

Haliburton.

R.S.O., chap. 4, ss. 19-21, which provide for the division of the Provisional County of Haliburton into Division Court divisions by the Lieutenant-Governor in Council.

Muskoka and Parry Sound.

R.S.O., chap. 5, s. 6, which provides that the Division Court divisions of the Provisional Counties of Muskoka and Parry Sound shall continue until changed by competent authority.

Discharge of Mortgages Seized.

R.S.O., chap. 136, s. 83, which provides for the discharge of mortgages seized under execution by a bailiff of the Division Court.

Deserted Wives.

R.S.O., chap. 167, s. 11, which gives an appeal to the Judge of the Division Court by the husband or wife upon a complaint made by a wife under The Deserted Wives Maintenance Act.

Woodmen's Liens.

R.S.O., chap. 154, ss. 10, 11, 14, 15, 16, 18 *et seq.*, which provide for the enforcing of The Woodman's Lien for Wages Act in the Division Court.

Master and Servant.

R.S.O., chap. 157, ss. 18-23, which provide for appeals to the Division Court against convictions or orders for the payment of wages, or any order of dismissal from service or employment, or against any decision of any justice or justices under The Act Respecting Master and Servant. Notice in writing of the appeal is to be given within four days after conviction and eight days at least before the holding of the court at which the appeal is to be heard, and the appellant is within four days to enter into a bond with the opposite party with two sufficient sureties to be approved by the Clerk of the Court in the penal sum of \$100. For form of notice of appeal, see Form 247; for form of bond, see Form 248; for form of approval of Clerk of bond, see Form 249. Except when the appeal is on a complaint by a foreman, manager, officer or other person whose wages are more than \$3 a day, it is not necessary for the appellant to join in the appeal bond. The bond and notice of appeal, with an affidavit of service

thereof, are to be filed in the Office of the Clerk of the Division Court, and the appeal may be tried with a jury if the appellant file with the Clerk at the time of filing the bond a notice requiring a jury, or if the respondent, within four days after service of appeal, files a notice with the Clerk requiring a jury, and if the proper fees are in every case deposited with the clerk. For form of demand of jury, see Form 250. Subject to the right of either party to have the appeal tried by a jury, the judge may try the appeal at such time and place as he may appoint, and upon such notice as to him seems reasonable. For form of execution in Division Court for enforcing an order made on appeal under these provisions, see Form 156.

Fraud by Debt Collectors.

R.S.O., chap. 255, which is as follows :—

(1) Every person, whether principal or agent, who prints or publishes any notice or form which is an imitation or a colorable imitation of any of the forms appended to The Division Courts Act, and which is calculated to deceive the public by inducing the belief that such notice or form is a notice or form from the said Court, or is part of the process of a Division Court, or who issues or makes use of any such notice or form in connection with any collection agency or otherwise, shall be liable to a fine not exceeding \$20 for every day on which any such offence is committed, the said fine to be recovered before a Justice of the Peace of the city or county with costs.

Public Schools.

R.S.O., chap. 292, s. 77 (7), which provides that all matters of difference between Trustees and teachers in regard to salary or other remuneration under a valid agreement, shall, whatever be the amount in question, be brought in the Division Court of the division where the cause of action arose, subject to appeal as provided by The Public Schools Act. Section 93 gives a right of appeal to the Minister of Education to a Divisional Court of the High Court.

High Schools.

R.S.O., chap. 293, ss. 41 (4) provides that all matters of difference between trustees and teachers of High Schools in regard to salary or other remuneration, whatever may be the amount in dispute, shall be decided in the Division Court of the division in which the cause of action arose, provided always that a decision of the Court in such cases may be appealed from as under The Public Schools Act, R.S.O., chap. 292, s. 93.

Separate Schools.

R.S.O. chap. 29, ss. 40-41, which provide that all matters of difference between trustees and teachers of Separate Schools in regard to salary or other remuneration, shall be brought and decided in the Division Court by the Judge of the County Court in each County, and that in pursuance of the judgment or decision given by the County Judge and not appealed from, execution may issue as in like manner as on a judgment recorded in the Division Court for debt.

Industrial Schools.

R.S.O., chap. 304, ss. 27-29, which contain provisions giving power to the Judge of the Division Court on the complaint of an Industrial School Corporation or Philanthropic Society, incorporated under The Act respecting Benevolent, Provident, and other Societies, or under any

other Act in force in the Province of Ontario and approved by the Lieutenant-Governor in Council, for the purpose of the Industrial Schools Act, or of any agent of the school corporation or philanthropic society at any time during the detention of a child in a certified industrial school to examine into the ability of a parent, step-parent or guardian of the child to maintain the child, and to make an order for the payment of a weekly sum for his maintenance and to vary the order from time to time, and authorizing the officers of the court to charge fees according to the lowest Division Court scale, and making all costs in the discretion of the Judge.

CONSOLIDATED RULES.

Interpleader.

Consolidated Rules Nos. 1125-1128 assume to give power in interpleader matters in the High Court or County Court to the Court or Judge to direct that where the amount of the execution or the value of the goods does not exceed \$100, the interpleader issue may be tried in a Division Court. It would appear that the Judges of the Supreme Court of Judicature had no power to make these rules. Their powers are conferred by the Judicature Act, R.S.O., chap. 51, s. 122, and The County Courts Act, R.S.O., chap. 55, s. 59. There is no statute giving to the Division Court jurisdiction to try issues sent from the High Court or a County Court. The rules of the Supreme Court are of no force unless they come within the terms of the statute conferring the power to make them; *Institute of Patent Agents v. Lockwood*, (1894) A.C. 347. It may be that questions arising on an interpleader may be referred under sections 28 and 29 of The Arbitration Act: R.S.O., chap. 62; to a Judge of the County Court or tried summarily by a County Court Judge by consent of the parties under C.R. 1110, but such a trial would not be a trial by the Division Court and the decision thereon would be subject to appeal, whereas a trial by a Division Court (*qua* Court) would be final.

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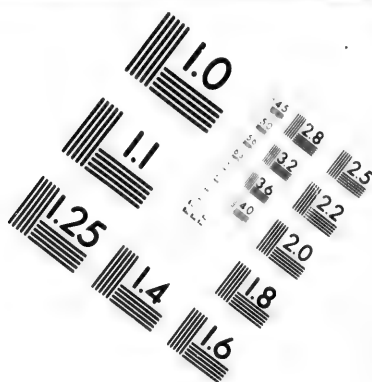
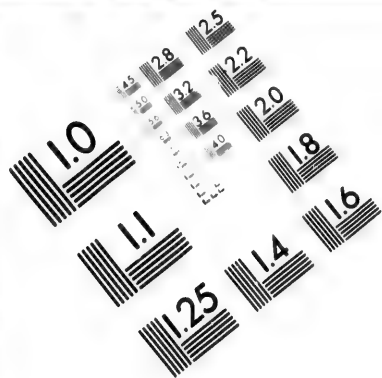
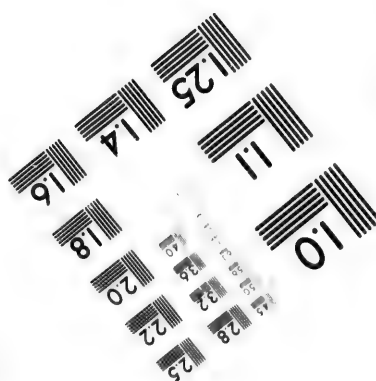
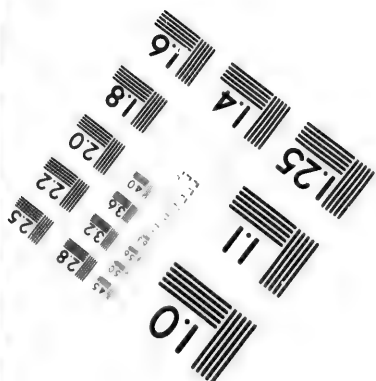
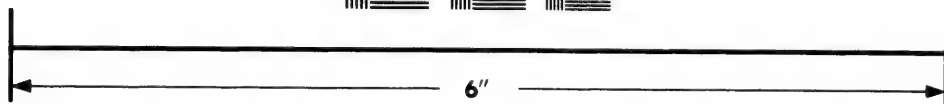
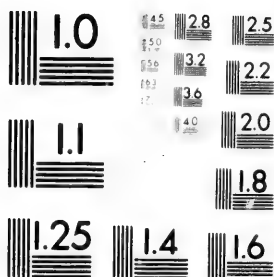


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